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IN THE

Supreme Court of the United States

October Term, 1963

No. 463

LYDON WEBBER, JOHN MARTINSON, JOHN P. MURPHY, JOSEPH O'DONNELL, JULIO F. PACHECO, J. DAMSTEDT, JOSEPH NESSMAR, K. VLACHOS, ROBERT C. MISCIONE, SOREN LASSEN, EDWARD MARSH, RICHARD THOMPSON, GRADY WATSON, GERALD E. PETTIPAS, MARVIN PHILLIPS, JOHN BOLING, ZYGMUNT W. OSINSKI; RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, ROBERT MATTHEWS, and LINDSEY J. WILLIAMS, as Trustees of the Seafarers Welfare Plan, and RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, E. B. McAULEY and AL TANNER, as Trustees of the Seafarers Vacation Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, KENNETH J. WRIGHT, RALPH E. CASEY, WILLIAM G. MULLINS, JOSEPH S. KISS, W. H. MILLS, C. J. BRACCO and JAMES TIERNEY, as Trustees of the Radio Officers Union Pension and Welfare Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, WILLIAM G. MULLINS, JOSEPH S. KISS and W. H. MILLS, as Trustees of the Radio Officers Union Vacation Plan; ROBERT C. FRAVEL, AHMED MEHSSIN; and MAX HARRISON and PRICE C. SPIVEY, as Trustees of the Maritime Advancement Programs,

Petitioners,

against

TURNER & BLANCHARD, INC.,

Respondents,

and

S.S. EMILIA and A. H. BULL STEAMSHIP CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HOWARD SCHULMAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Lydon Webber, John Martinson, John P. Murphy, Joseph O'Donnell, Julio F. Pacheco, J. Damstedt, Joseph Nessmar, K. Vlachos, Robert C. Miscione, Soren

Lassen, Edward Marsh, Richard Thompson, Grady Watson, Gerald E. Pettipas, Marvin Phillips, John Boling, Zygmunt W. Osinski; Russell H. Brandon, Max Harrison, James Hayes, Al Kerr, Robert Matthews, and Lindsey J. Williams, as Trustees of the Seafarers Welfare Plan, and Russell H. Brandon, Max Harrison, James Hayes, Al Kerr, E. B. McAuley and Al Tanner, as Trustees of the Seafarers Vacation Plan; Joseph P. Glynn, Andrew MacDonald, Kenneth J. Wright, Ralph E. Casey, William G. Mullins, Joseph S. Kiss, W. H. Mills, C. J. Bracco and James Tierney, as Trustees of the Radio Officers Union Pension and Welfare Plan; Joseph P. Glynn, Andrew MacDonald, William G. Mullins, Joseph S. Kiss and W. H. Mills, as Trustees of the Radio Officers Union Vacation Plan; Robert C. Fravel, Ahmed Mehssin; and Max Harrison and Price C. Spivey, as Trustees of the Maritime Advancement Programs, respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit to review the decision and mandate of the Court of Appeals for the Second Circuit dated June 28, 1963, which Court affirmed the order of Mr. Justice Jacob Mishler of the United States District Court for the Eastern District of New York, dated May 21, 1963, which in part held that the cost of discharging the cargo of the S.S. EMILIA, was a marshal's expense and the cost of discharging said cargo should be paid out of the proceeds of the sale of the vessel.

Opinion Below

The opinion of the Court of Appeals of June 28, 1963, which is not yet reported, appears as Appendix "A" on page 1a, attached to this petition.

Jurisdiction

The order of Mr. Justice Jacob Mishler of the United States District Court for the Eastern District of New York, dated May 21, 1963, was entered on the 22nd day of May, 1963, and was appealed to the said United States Circuit Court for the Second Circuit (28 U. S. C. 1291, 28 U. S. C. 1292). The decision and opinion of Mr. Justice Mishler was affirmed by the United States Circuit Court for the Second Circuit on June 28, 1963.

The jurisdiction of this Court is invoked under the General Maritime Law of the United States and under 28 U. S. C. A. 1254(1).

This petition for a writ of certiorari is timely filed.

Questions Presented

1. Does the discharging of the cargo of an attached vessel inure to the benefit of the lienors as required by the test set forth by this Court in *New York Dock Co.* v. *S.S. Poznan*, 274 U. S. 117 (1927), and therefore is a marshal's expense?

2. Did the United States Circuit Court for the Second Circuit improperly interpret and extend the Supreme Court's decision in *New York Dock Co.* v. *S.S. Poznan*, 274 U. S. 117 (1927).

3. Does the decision of the Court below, holding that the cost of discharging cargo of an attached vessel is a marshal's expense, change the long-established law governing and regulating the ranking and order of priority of maritime liens to be satisfied out of an inadequate fund?

Statute Involved

The statute involved concerning maritime liens is 46 U. S. C. A. § 953 through 975.

Statement of the Case

The United States Circuit Court for the Second Circuit denied the petitioners' appeal taken from so much of that portion of an order of Mr. Justice Jacob Mishler of the United States District Court for the Eastern District of New York, dated May 21, 1963, which decreed that the cost of unloading the cargo of the S.S. Emilia, shall be a marshal's expense and shall be paid out of the proceeds of the sale of the vessel.

This petition for a writ of certiorari, as indicated previously, is filed on behalf of various libellants who have libeled the S.S. Emilia for wages, maintenance and cure, contributions due to Seafarers Welfare Plan, Seafarers Vacation Plan, Radio Officers Union Pension and Welfare Plan, Radio Officers Union Vacation Plan and Maritime Advancement Programs.

The S.S. Emilia is an American merchant vessel owned by A. H. Bull Steamship Co., and was attached by over thirty libellants who liened the said vessel for wages, contributions due to pension, welfare and vacation funds, for services, repairs, wharfage, supplies and various other items. In addition, three intervening possessory libels were filed by Caltex (India) Ltd., the Government of Pakistan and the United States of America, claiming possession of their cargo aboard the S.S. Emilia. These were filed in March of 1963, approximately three months after the vessel had been seized. Although there were a number of other cargo owners having cargo aboard the S.S. Emilia, the three intervening possessory libellants owned the substantial majority of cargo aboard the vessel.

Process against the said vessel was issued by the United States Federal Court for the Eastern District and Southern District of New York. The first lien against the vessel was filed in December, 1962.

For almost three months the S.S. Emilia was liened and was at its dock in Brooklyn, New York. The cargo owners did nothing during this time to repossess or reclaim their cargo. Around the middle of March, 1963, the cargo owners filed intervening possessory libels for possession of their cargo. Immediately, thereafter, they obtained an order to show cause on March 14, 1963, signed by Mr. Justice George Rosling of the United States District Court for the Eastern District of New York, returnable on March 20, 1963, seeking to regain possession of their cargo, to have the cargo discharged and to have the cost of discharging the said cargo adjudged and decreed a marshal's expense.

On the return date, March 20, 1963, Mr. Justice Rosling, after receiving various affidavits in opposition to the said application, heard full and complete oral arguments on March 20th and 21st, wherein many of the libellants set forth their respective positions. It is interesting to note that all the libellants, other than those intervening possessory libellants making the application, objected strenuously to the application. The objection to the application was not to the cargo owners regaining their cargo, for there was no doubt that they are entitled to this, but objection was made on the ground that the cost of unloading the cargo should not be an administrative expense or marshal fee, since it would not inure to the benefit of all the libellants or lienors. Mr. Justice Rosling advised the cargo owners that they could have immediate possession of their cargo, but that he would reserve decision as to whether the cost of unloading the cargo should be an administrative expense or marshal fee. In fact, the United States Government at that time indicated it was willing to accept this offer of unloading its cargo, paying the cost of discharging the cargo and if at a later time it was decided by Judge Rosling that the cost of unloading the cargo should be an administrative expense or marshal fee, then be reimbursed. The other two possessory libellants wanted an immediate decision as to whether the cost of unloading the cargo would be an administrative

expense or marshal fee, and would not remove their cargo until such a decision was made. Thus, before seeking repossession of their cargo, they wanted it to be decreed that the cost of discharging the cargo would be a marshal's fee payable out of the proceeds of the sale. The United States Government, as a cargo owner, joined the position of the other two possessory cargo libellants.

After oral argument, since the majority of the three cargo applicants would not accept Judge Rosling's offer to have immediate possession of their cargo, and have the decision as to whether the cost of unloading the cargo would be an administrative expense or marshal fee decided later, Judge Rosling reserved decision on the application.

There was no doubt that the cargo owners had the opportunity and right to have immediate possession of their cargo either at their own expense or in the alternative to advance moneys to discharge the cargo and at a later date, if after full and complete deliberation, Judge Rosling decided that the cost of unloading the cargo would be a marshal's expense, the cargo owners would then be reimbursed out of the proceeds of the sale of the vessel. The cargo owners refused to do this.

In the interim period, Turner & Blanchard, Inc., libellants for wharfage charges, on or about April 24, 1963, obtained an order to show cause signed by Mr. Justice Jacob Mishler, a Justice of the United States District Court for the Eastern District of New York, to show cause why the S.S. Emilia should not either be moved to another pier or the vessel sold. The said order to show cause was returnable April 26, 1963, before Judge Mishler. (See Appendix "B", p. 3a, for a copy of order to show cause with annexed supporting affidavit.)

It is interesting to note that in the application made by Turner & Blanchard, Inc., the pier owner, no request was made to have the cargo unloaded or request that the cost of

unloading the cargo should be a marshal's expense, payable out of the proceeds of the sale of the vessel. All the motion of Turner & Blanchard, Inc., requested was either to have the vessel moved to another pier or sold to save on the cost of wharfage. (See moving papers, Appendix "B", p. 3a.)

On the return date of the said motion, affidavits were submitted in opposition to Turner & Blanchard, Inc.'s, application, on the ground that there was no objection to the ship being moved to another pier to keep down administrative expenses of wharfage charges, but that in view of the fact that there was a contemplated reorganization, that the sale of the ship should not take place. It is important to note that oral argument had that day, was only on the aforesaid issue of whether the ship should be moved or sold. No argument was had on whether the cargo should be unloaded or who should bear the cost. No such application was made. The issue was not presented to Mr. Justice Mishler.

Up until the time of the motion made by Turner & Blanchard, Inc., the cargo owners took no further steps to reclaim their cargo after they made their motion before Judge Rosling, ~~and upon which motion~~ Judge Rosling had reserved decision. Subsequently, Mr. Justice Mishler, in an order dated May 13, 1963 (a copy of which is set forth in Appendix "C", p. 13a), signed an order, ordering the S.S. Emilia to be sold. Thereafter, the Marshal in accordance with the order, set up a sale date for the vessel to be held on Wednesday, May 22, 1963, at 11:00 A.M., at the foot of 21st Street (Bull Line Pier) Brooklyn, New York. The vessel was advertised to be sold but not including the cargo. No mention of the cost of unloading the cargo was made in this order.

The cargo interests saw in the Turner & Blanchard application to move the ship, an opportunity to achieve by a back-door approach, the result which they had not gotten by a direct application to Judge Rosling. There was a meeting or meetings at which the cargo owners were present

before Judge Mishler in which they eventually prevailed upon Judge Mishler to amend his order of May 13, 1963, to include a provision that the cargo of the S.S. Emilia would be discharged and the cost of discharging the cargo would be a marshal's expense paid out of the funds received from the sale of the vessel. It is believed that this meeting, conference or discussion took place on or about May 20, 1963. As far as can be ascertained, none of the other libellants or lienors' representatives were present and particularly those who are presently making this application.

On the morning of May 21, 1963, the office of Howard Schulman, proctor for various libellants and petitioners in this application, was advised informally by one of the attorneys for one of the libellants that Judge Mishler was going to sign an order that afternoon which would adjourn the date of sale from May 22, 1963, to May 28, 1963, and decree which would adjudge and decree that the cost of unloading the cargo would be a marshal's expense. Upon ascertaining this and not having any prior information that this was to take place, the said office of Howard Schulman, contacted Judge Mishler's chambers and was advised that the action was going to take place that afternoon. Strenuous objections were made that the lienors and libellants who had an interest in this proceeding, were being deprived of due process and that this decision should be only made after a proper application and a full and complete hearing was held so that all interested parties could set forth their position including opposing affidavits and memoranda of law.

Later in the morning, the said Howard Schulman's office was notified by the United States Attorney's Office, who was representing the United States Government, as a cargo owner, that it had been instructed by Judge Mishler's office to serve on said Howard Schulman's office a copy of the proposed order of May 21st and that the Court would hear oral argument at the time of the proposed signing of the order

that afternoon at 4:30 P.M., May 21, 1963, in Judge Mishler's chambers. This notice was received at approximately noon on May 21, 1963.

That afternoon, at 4:30 P.M. in the chambers of Mr. Justice Mishler, there were present the attorneys for the three cargo owners plus a number of attorneys for the libellants including petitioners' attorney. The Judge briefly heard argument as to why the order should not include a provision adjudging and decreeing that the cost of unloading the cargo be a marshal's expense to be paid out of the funds received from the sale of the vessel. All of the attorneys for libellants or lienors who were present, other than the intervening possessory cargo libellants, argued that it should not be a marshal's expense, due to the fact that it would not be for the best interest of the res or fund. A request was made to have a complete and full hearing and argument on this point with an opportunity to present affidavits and legal memoranda of law. The request was denied and the Judge immediately signed the order at that time. A copy of this order of Judge Mishler dated May 21, 1963, which is the basis of this appeal is set forth as Appendix "D" on p. 14a. This was the only argument and opportunity had to be heard on the provisions of the said order concerning the cost of discharging the cargo as a marshal's expense. The order further provided that the sale of the vessel take place on May 28, 1963.

The owner of the S.S. Emilia in the interim period had filed a petition under Chapter 10 of the Bankruptcy Laws, requesting a Court supervised reorganization.

On May 23, 1962, the day after Judge Mishler had signed his order, providing that the cost of discharging the said cargo would be a marshal's expense payable out of the proceeds of the sale of the vessel and scheduling the sale of the vessel for May 28, 1963, Judge Thomas F. Croake, sitting in the United States District Court for the Southern District of New York in Bankruptcy, enjoined the sale of all Bull Line ships, including the S.S. Emilia.

Thereafter, it is believed upon application made by the United States Government and other cargo owners, the S.S. Emilia was exempted from the bankruptcy proceedings restraining order and was permitted to be sold, by Mr. Justice Croake. As a result of this action, a new order was signed by Judge Mishler, setting the date of the sale of the S.S. Emilia for June 4, 1963, at 11:00 A.M. at the foot of the 21st Street Bull Line pier, Brooklyn, New York. A copy of the order is set forth as Appendix "E" on p. 16a.

It is important to note that the sale of the S.S. Emilia was advertised not to include any cargo and the ship was to be sold free of cargo. The starting or upset bid price was to be $250,000 and it was stated in the order that title would pass to the new owner as soon as possible but not later than thirty days after the date of the sale.

It is also important to note that while the matter before Mr. Justice Jacob Mishler was being argued as to whether the cost of discharging the cargo of the S.S. Emilia should be a marshal's expense, payable out of the proceeds of the sale of the vessel, that the application by the three possessory intervening libellants, was still pending before Mr. Justice Rosling of the same Court, who had reserved decision on their application for this relief. It was only after Mr. Justice Mishler signed his order of May 21, 1963, that the three intervening possessory libellants, the cargo owners, withdrew their application without prejudice from Judge Rosling. Thus was created the anomalous situation of the same application pending at the same time before two Justices of the same Court. In effect, Judge Mishler decided an issue which had been pending for over two months before Judge Rosling of the same Court.

After Judge Mishler's order the petitioners in this matter filed a notice of appeal from the said order dated May 21, 1963, which declared that the cost of discharging the cargo was a marshal's expense payable out of the proceeds of the

sale of the vessel. The said notice of appeal was filed on June 4, 1963, and other lienors also subsequently filed notices of appeal.

On June 4th, the said vessel was offered for sale and there were no bidders for the minimum bidding price of $250,000. No new sale date was set.

Thereafter the cargo owners made an application to the United States Circuit Court for the Second Circuit, on June 11, 1963, requesting that an expeditious hearing of petitioners' appeal be granted and the said application was granted. The appeal was set down by the United States Circuit Court for the Second Circuit for hearing and argument on June 20, 1963. On June 20, 1963, argument was had by the various parties before the Circuit Court.

Thereafter, on June 28, 1963, the Circuit Court handed down a *per curiam* decision, which is set forth as Appendix "A" on page 1a.

The said decision affirmed the order of Mr. Justice Mishler dated May 24, 1963, and held in effect that the cost of discharging the cargo inured to the benefit of the lienors and therefore was a marshal's expense. In reliance of its decision, the Court cited *New York Dock Co. v. S.S. Poznan*, 274 U. S. 117 (1927).

Thereafter Judge Mishler in accordance with the decision of the Court of Appeals entered an order dated July 3, 1963, directing that the S.S. Emilia be sold upon six days public notice and that the cost of unloading the cargo shall be a marshal's expense of the sale payable out of the proceeds of the sale of the vessel. A minimum bid price of $250,000.00 was set forth in said order. The order also provided that the S.S. Emilia be discharged prior to its sale.

The S.S. Emilia was thereafter scheduled for sale on July 30, 1963. Prior to the sale the cargo was discharged and the vessel was sold on July 30, 1963 for the sum of $250,000.00, the minimum bidding price set by order of the

court to Consolidated Mariners Inc., and the proceeds of the sale deposited with the registry of the Court by the marshal. The said sale was confirmed by order signed by Mr. Justice Mishler, August 1, 1963.

The time to file a petition for a writ of certiorari from the decision and mandate of the United States Court of Appeals for the Second Circuit is September 26, 1963. In the interim time the attorney for the petitioners consulted with his clients to ascertain whether they would authorize the filing of a writ of certiorari, and also evaluated the merits of the success of a petition for a writ of certiorari.

In maritime proceedings of this nature, it is usual and customary that payment of marshal's expenses would not be made until all claims have been presented and evaluated and only after a full hearing was had on the reasonableness of all the marshal's expenses. If the usual and customary procedure was followed, no such payment of marshal's expenses would have been made until after petitioners' time for filing a petition for writ of certiorari and action thereon was had.

For some reason or other, the United States Attorney's office, acting in a most unusually expeditious manner, made an application to the United States District Court for the Eastern District of New York by order to show cause, returnable August 7, 1963, before Mr. Justice Mishler, in which it was requested that the Court issue an order directing the Clerk of the Court to turn over to the United States Marshal of the District, all necessary funds out of the proceeds of the sale of the S.S. Emilia, presently in the Registry of the Court, to discharge all obligations and liability incurred and claims made while the vessel was in the custody of the marshal, pursuant to the court order, including the cost of discharging the cargo of the S.S. Emilia and all expenses connected therewith.

It is interesting to note that although there were other marshal's expenses, such as wharfage, that no application

for the payment of the marshal's expenses constituting wharfage was made. The only application made was to have primarily the marshal's expenses covering the cost of discharging the cargo paid. At a later date, after this motion was decided, the application for payment of the wharfage charges as a marshal's expense was made and as shown hereinafter all the marshal's expenses in the proceedings exceeded the proceeds received on the sale of the ship. In the usual situation all marshal's expenses are usually paid at the same time and it is unusual to request that part of the marshal's expenses be paid before others, particularly where the proceeds of the sale of the ship are less than all the marshal's expenses.

On August 7, 1963, the said motion was argued before Mr. Justice Mishler and it was contended by the petitioners that pending determination of petitioners' application for a writ of certiorari, which was to be filed, that none of the proceeds of the sale to pay the cost of discharging cargo, should be turned over to the marshal, pending the timely filing and disposition of such petition before the United States Supreme Court, reviewing the United States Court of Appeals for the Second Circuit's decision and mandate affirming that the cost of discharging cargo is a marshal's expense payable out of the proceeds of the sale. It was contended that no prejudice would result to the parties concerned as a result of this and that if the proceeds were turned over to the Marshal so that marshal's expenses covering the cost of discharging the cargo be made, that serious and irreparable harm would result to the petitioners and other libellants, if the petition for the writ of certiorari was granted and the Supreme Court of the United States, agreed with petitioner's position that the cost of discharging the cargo was not a marshal's expense. It was explained that it would be difficult to recoup moneys paid out as marshal's expenses for the cost of discharging cargo, if it was subsequently held that this was not a marshal's expense. The court would have turned money over to the

marshal which it should not have, the marshal would have made improper payments of funds in his care and the company, discharging the cargo, would have received moneys improperly. The difficulties, conflicts and serious legal problems that would be presented were obvious and it was on these grounds that it was requested that no distribution of the proceeds to pay marshal's expenses should be made.

Judge Mishler rendered a decision in open court that day, stating that he would grant the United States Attorney's application that the funds be turned over by the registry of the court to the marshal to pay the marshal's expenses of discharging the cargo of the S.S. Emilia. In open court, an order which had been prepared by the Government, was submitted to the Judge for signature. However, Judge Mishler stated that he would give petitioners two days, until August 9th, to get a stay of this order from the United States Court of Appeals for the Second Circuit.

On the same day the order signed by Mr. Justice Mishler (a copy of which is set forth as Appendix "F" on page 17a) an application was made to the Court of Appeals for the Second Circuit, requesting a stay of that portion of the order which directed the Clerk of the United States District Court for the Eastern District of New York, to turn over the proceeds of the sale of the S.S. Emilia, to pay marshal's expenses incurred in the course of discharging the cargo, said order had been issued pursuant to the decision and mandate of the Circuit Court.

The petitioners' application was heard before the Circuit Court for the Second Circuit the following day, August 8, 1963, before Mr. Justice Leonard P. Moore and Mr. Justice Thurgood Marshal, both judges having heard the original appeal. From the bench, the Judges stated that they would not grant petitioners' application for a stay and gave petitioners until August 14, 1963, to get a stay from the United States Supreme Court (a copy of this order is set forth as Appendix "G" on page 19a).

Thereafter petitioners promptly made application for a stay, to the United States Supreme Court, of the said order and the stay was granted by Mr. Justice John M. Harlan of this Court on the condition that petitioners file their petition for a writ of certiorari on or before September 12, 1963, so that this Court could act expeditiously at the first available term on the application.

It is interesting to note that during the application to the United States Supreme Court for a stay of the order concerned, that the pier owner, Turner & Blanchard, Inc., made an application to the United States District Court for the Eastern District of New York, returnable before Judge Mishler, for wharfage fees amounting to the sum of $105,723.39. This is in addition to the other marshal fees in the amount of $192,176.62, and makes a grand total of marshal's expenses of $297,900.01, thus, wiping out completely the proceeds of the sale, which amounted to $250,000 and leaving no sums of money left for any lienor of the S.S. Emilia to be paid, including lienors for wages, maintenance and cure and personal injuries.

This petition for a writ of certiorari is timely and in accordance with the decision and order of Mr. Justice John M. Harlan of this Court.

Reasons for Allowance of the Writ and Arguments Amplifying the Same

1. This Court has never decided the important question which underlines the whole basis of this application. The question as to whether the discharging of cargo from a liened or attached vessel would be a marshal's expense payable out of the proceeds of the sale of the ship on the ground that it inures to the benefit of the lienors of the vessel has never been decided by this Court. It can readily be seen that this is a question of first instance and is one of para-

mount importance and should be resolved by this Court. Unless this question is resolved by this Court, chaos and conflict would result in the various circuits.

2. The Circuit Court improperly interpreted and extended this Court's decision in the case of *New York Dock Co.* v. *S.S. Poznan*. As a result of this action, this case raises the important question as to the proper interpretation of the *Poznan* case. The improper interpretation of the case by the Court of Appeals for the Second Circuit will create conflict among the different circuits. The proper interpretation of the *Poznan* case decision and how it applies to the case at bar, should be resolved by this Court in order to avoid this.

3. The decision of the Circuit Court affirming the decision of the District Court has changed the long-established law governing and regulating the order of priority and order of liens to be satisfied out of an inadequate fund when a vessel is attached. Throughout the years, the Courts have established the ranking and order of priority liens in such a situation. These liens were codified by statute (46 U. S. C. 953, et seq.). Definite rules of priority are essential so that parties may at least know their rights in advance. The decision below changes the order and priority of ranking of maritime liens, making a shamble of the laws of priorities of maritime liens, and will cause conflict in the different circuits unless resolved by this Court.

4. The decision below will result in conflict among the various circuits. As will be shown hereafter, it has been the long-established law, custom and practice in the Admiralty Courts that the cost of discharging cargo is an expense borne by the cargo owner. It has long been established and not questioned. The decision below, however, changed this long-established law, custom and practice and will create upheaval and conflict in the various circuits unless resolved by this Court.

ARGUMENT

I

The decision and interpretation of the *Poznan* case by the Court of Appeals for the Second Circuit Court is not in accord with the applicable decision of this Court.

(a) The discharging of the cargo does not inure to the benefit of the lienors as required by the test set forth by this Court in the *New York Dock Company* v. *S.S. Poznan*, 274 U. S. 117 (1927), and is therefore not a marshal's expense.

Before going into detail as to the reasons why this Court should grant petitioners' application for a writ of certiorari, it is necessary to explain the background of the law in this case.

At the outset, no one disputes the right of any cargo owner to reclaim his cargo. The only dispute is whether the cost of discharging that cargo should be paid for by the cargo owner or by the other lienors by having it held to be a marshal's expense payable out of the proceeds of the sale of the vessel, before payment of any other preferred maritime liens. When the cargo owners made their initial application before Judge Rosling in the United States District Court for the Eastern District of New York, for their cargo to be discharged and the cost thereof to be a marshal's expense, Judge Rosling gave the cargo owners the right to immediate possession of their cargo but indicated he would reserve decision as to whether the cost of such discharging of cargo would be a marshal's expense. The cargo owners, at that time, all refused to accept this offer and would not remove their cargo unless they had assurance that the cost would be a marshal's expense. The cargo owners claim that it is to the advantage of all the lienors to have the ship's

cargo discharged so that the ship can be sold, and that without discharging the cargo the ship cannot be sold. It is interesting to note that all the other lienors have taken the position adverse to this, claiming that the discharging of the cargo does not inure to the benefit of the lienors and therefore should not be a marshal's expense.

The test as to what constitutes a marshal's expense is set forth in the case of *New York Dock Co.* v. *S.S. Poznan*, 274 U. S. 117, 47 S. Ct. 482, 71 L. Ed. 955 (1927). The test as outlined in that case is whether the act would benefit all of the claimants interested in the fund created from the sale of the vessel, in order to hold the cost of discharging the cargo as an administrative expense. It is petitioners' position that the discharging of the cargo does not inure to the benefit of all the lienors. The cargo owners want their cargoes to be discharged at someone else's expense, namely the other lienors. In support of this position, they cited the *New York Dock Co.* v. *S.S. Poznan*, *supra*. It is submitted that this case stands for the proposition that any service or property furnished after the arrest of the vessel for the common interest of those interested in the fund administered by the Court, should be paid from the fund as an expense of justice on principles of equity. See Gilmore and Black, *The Law of Admiralty*, pages 498 and 596, § 9-61.1. The case further goes on to state that wharfage furnished while the vessel was in the custody of the United States Marshal under an Admiralty warrant of attachment is such a service for the benefit of those interested in the fund and that the cost of wharfage should be paid as an administrative expense. This is all that the *New York Dock Co.* v. *S.S. Poznan*, *supra*, holds. The cargo owners state that the case holds that the cost of unloading the cargo should be an administrative expense since it inures to the benefit of all the libellants. The Court of Appeals agreed with this. It is respectfully submitted that the decision of the United States Court of

Appeals for the Second Circuit, improperly interpreted and extended the *Poznan* case.

In the *Poznan* case, *supra*, the owner of the vessel entered into a contract with the wharf owner on December 1, 1920, at the rate of $250.00 per day. On December 2, 1920, the vessel tied up and was arrested for libels for *non-delivery of cargo and for damages for breach of contract for affreightment.* (Italics supplied for emphasis.) The marshal allowed the vessel to remain at the pier. The vessel remained at the pier until March 11, 1921. The marshal refused to pay the wharfage due after the seizure. It was held that the wharfage which was furnished after the arrest of the vessel was a benefit to all the libellants and therefore was entitled to be paid as an administrative expense incurred by the marshal, which means that payment of this expense would be made prior to any payment being made to the maritime lienors of the said vessel. There is no doubt that wharfage is of a benefit to all the libellants for the simple reason that the vessel does need some place to stay during its seizure and cannot be cut adrift and left alone at its own peril. Wharfage maintains the well being of a vessel. The unloading of cargo, however, is entirely different and is not for the benefit of the vessel or the other lienors, but merely for the benefit of the cargo owners. It is interesting to note that in the *Poznan* case, *supra*, by inference the unloading of cargo was for the benefit of the libellants solely because of the reason that *all the libellants* in the *Poznan* case *were cargo owners* who were *libelling the ship for non-delivery of cargo and for damages for breach of contract of affreightment.* (Italics supplied for emphasis.) Naturally since all the libellants were cargo owners, it would be to their advantage to have the vessel unloaded or discharged.

In the case at bar this is not the situation. Of all the libellants concerned there are only three intervening possessory libellants of cargo. All the other libellants hold maritime liens for wages, supplies, repairs, mortgages, con-

tributions due to various pension, welfare and vacation funds, personal injuries, maintenance and cure and other similar situations. None of these interests were present in the *Poznan* case.

It is difficult to understand if the discharging of the cargo would benefit all the libellants why there is such strenuous opposition to it by all the libellants or lienors The sole persons who would benefit from the discharge of the cargo would be the owners of the cargo. They are sitting back playing a waiting game and taking the position that if you want to sell that ship without the cargo, you pay the cost of removing the cargo, all this to the detriment of the other lienors. If this was done not only would it be inequitable and unfair, but would be an unjust enrichment. This is precisely contrary to the rationale of the *Poznan* case. In the *Poznan* case, the libellants paid for the removal of the cargo themselves only because as indicated, previously, all of the libellants were cargo owners and the action was for non-delivery of cargo and for damages for breach of contract of affreightment. No other type of lien was present.

Judge Mishler in his *nunc pro tunc* memorandum decision below (a copy of which is set forth as Appendix "H" on page 21a) states that the libellants or lienors have no greater rights than the owners of the vessel and bases his decision in part on this. This reasoning is based upon a misconception that an admiralty sale can only dispose of the ship owners rights in and to the liened vessel. Nothing is further from the truth. It is basic law that *in rem* decrees of an Admiralty Court following a judicial sale—"scrapes the ship free of claims"—a result which no sale by the shipowner himself can ever accomplish. Gilmore and Black, *The Law of Admiralty*, pages 482, 641. *Robinson on Admiralty*, page 414, described the effect as follows: "It is, as it were, a dry-docking process by which the hull is scraped again of her accumulation of encumbrances". See also *Benedict on Admiralty* (6th Ed. 1940), Vol. 1, page 21. The Admiralty Court does not

act as a ship owner but as a custodian protecting the res and all those who have an interest in it.

It is clear, therefore, that the fact that certain cargo was "lawfully and rightfully on board the Emilia" is irrelevant to any determination of the conflicting claims asserted by the various lienors. The ship owners' failure to discharge the cargo constitutes no greater wrong than its failure to discharge its obligations to the Emilia's unpaid seaman, tort claimants, mortgagees and supply men, all of which are just as "lawful and rightful" as the claims of the cargo owners. All of the lienors are equally the victims of an insolvent enterprise; their rights are to be determined, not by *ad hoc* considerations of convenience or "natural justice" but by the established system of priorities carefully worked out over the years by the courts and by Congress itself.

There is no doubt that the Emilia's failure to perform her voyage constitutes a breach of the contracts of carriage embodied in the bills of lading issued to the cargo owners, but by the same token, the failure to return the cargo on demand, entitles the cargo owners to invoke the remedies which the law provides in such instances. They may elect to bring an action for conversion or for replevin, or they may abandon the cargo and sue to recover its sound market value at destination, or they may sue for damages for non-delivery of cargo and breach of affreightment and file maritime liens for the damages. They have not adopted any of these procedures due to the fact that they know that if they do, they will be relegated to a class IV preferred lien, which is behind the lien for wages, personal injuries, and behind the mortgagee's liens. These damages that they suffered would be part of their claim against the Emilia and part of the damage they suffered would be the cost of regaining their cargo. In any case, they realized that their claim would not be entitled to privileged or preferred status. Therefore, they are in turn attempting to establish a radical change in the long existing law governing and regulating the priority of maritime liens

by having it decreed that the cost of discharging cargo inures to the benefit of the lienors and therefore should be a marshal's expense.. This in effect will take priority over seamen's claims for wages, personal injuries and other claims of a similar nature. This aspect will be dwelt on more fully subsequently in this petition.

Judge Mishler places too much emphasis on "the rightful and lawful" status of the cargo aboard the Emilia. There is no doubt that the cargo owners' cargo was rightfully and lawfully aboard the vessel initially.

Judge Mishler in his *nunc pro tunc* decision (see Appendix "H", page 21a for copy of the decision) stated that because the cargo was rightfully and lawfully aboard the S.S. Emilia that sale of the owner's interest in the vessel cannot serve greater right than the owner had nor can it impose an additional liability on the cargo owners. This reasoning is completely fallacious and illogical. There is no basis for this in law or fact. Although the cargo may have been rightfully and lawfully aboard the ship in the first instance, there is no doubt, that if this vessel was not seized and the cargo owners abandoned their cargo aboard the ship that the ship owner would have the right to declare the cargo abandoned and sell it, if the cargo owner did not claim it. Certainly the ship owner would not permit the cargo owners to leave their cargo aboard the ship and tie up the vessel, as the cargo owners have done in the present case. Therefore, even using Judge Mishler's statements that the Court has no greater interest than the ship owner's interest, the Court would still have the power to declare the cargo abandoned and sold, if the cargo owners did not claim it.

Petitioners do not take the position that Judge Mishler's reasoning was correct. In fact they take the position that it was incorrect, but for argument's sake to show the fallaciousness of Judge Mishler's reasoning, it was assumed it was correct and the illogical conclusion that followed from its conclusion has just been set forth.

It is petitioners' position that the Admiralty or Maritime Courts of the United States have a greater right than the ship owner and can do whatever is necessary to protect the interests of the *res*, which has come into its custody as a result of the ship being liened.

In the case of *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U. S. 684, 70 S. Ct. 861 (1950), this Court discussed the powers of the Admiralty Courts of the United States and stated:

> "* * * It would be strange indeed thus to hobble a legal system that has been so responsive to the practicalities of maritime commerce and so inventive in adapting its jurisdiction to the needs of that commerce * * *. We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction * * *." (pp. 691-692)

Thus the Supreme Court did not have the same fears and trepidations of the powers possessed by an Admiralty Court that Judge Mishler had in the court below. In order to resolve a problem arising from a maritime transaction, a court of admiralty has equitable powers to do so.

The conduct of the cargo owners in failing to repossess and remove their cargo was detrimental to the well being of all the other lienors. It not only increased the wharfage charges, which clearly constitute a marshal's expense but also increased other expenses of sale, which should have been kept at a minimum. In fact their conduct prevented an immediate sale and perhaps if they did not engage in this conduct the sale of the vessel would have been at a higher price.

Since the attachment of the vessel in December 1962, the cargo owners had the right to remove their cargo but would not avail themselves of this unless the cost of discharging the cargo was held to be a marshal's expense.

The failure of the cargo owners to remove their goods could well be construed an action of constructive abandonment, entitling other parties interested to remove the cargo, at the cargo owners' expense. In fact this theory was advanced and followed a long time ago, in the case in the United States District Court, Eastern District of Pennsylvania, known as *R. A. Crosby, et al. v. S.S. Northern Wave*, Ad. Nos. 149 and 150 (1920). This is an unreported decision in which the same situation existed. There was cargo aboard the S.S. Northern Wave and the cargo owner did not claim it. In that case, the Court decreed that unless the cargo owner came forth and removed its cargo, at its own expense, that the court would discharge the cargo at the owner's expense and if it were not claimed by a certain time, it would be declared abandoned and sold. (Copies of these orders in this unreported case are set forth as Appendix "I", p. 23a.) Thus in 1920, a District Court in a similar situation as the case at bar, had no qualms of exercising the powers that an Admiralty Court has to declare cargo abandoned if not reclaimed, and sold to pay the cost involved in removing the cargo. This is what the Court below should have done. In fact it is interesting to note that upon the seizure of the S.S. Emilia, one of the cargo owners, Maritime Tobacco Co. Inc., who had a cargo of tobacco aboard the S.S. Emilia, petitioned the Court for the removal of its cargo of tobacco supplies and the cargo owner voluntarily agreed to pay the cost of removing its cargo. This was the application of Marine Tobacco Company, Inc. in *Marine Tobacco Company, Inc. v. A. H. Bull Steamship Co. (S.S. Emilia)*, 63 Admiralty 139, U. S. District Court for the Southern District of New York (1963). This cargo owner recognized the long-established law and practice and custom of the various courts, and agreed to pay the cost of discharging its cargo without claiming it was to the benefit of the other lienors and therefore should be a marshal's expense. (See Appendix "M" on p. 40a for a copy of this order.)

The history of the S.S. Emilia clearly shows that the cargo owners' action may be properly characterized as a "sit down strike" on their part, indicating an attitude of complete unconcern and disregard on the part of the cargo owners with respect to all the other lienors. Their stubborn position throughout the whole proceeding not to remove their cargo unless the cost is paid for by others, clearly indicated this. In fact rather than conferring any benefit to the lienors, their action has been a positive detriment to the lienors. As of the present time they have been successful in saddling their business expenses on the lienors.

Judge Mishler and the Court of Appeals have been reluctant to order the cargo owners to remove their cargo at their own expense. There is no doubt that Admiralty Courts have this power and if a cargo owner does not remove his cargo, it can be declared abandoned and sold. (See *R. A. Crosby, et al. v. S.S. Northern Wave*, Admiralty Nos. 149 and 150 (1920), United States District Court, Eastern District of Pennsylvania.) If this action was taken, the cargo owners would not continue to engage in a "sit down strike" to the detriment of all the other lienors, or else the cargo would be declared abandoned. If this was done, the speed the cargo owners would remove their cargo from the ship, would be dazzling. The proper procedure would have been for the District Court to order the cargo discharged at the expense of the cargo owners. If the owners did not pay for this voluntarily or as a condition to obtaining possession of their cargo (they would have to pay their pro rata share of discharging the cargo), then the cargo would be declared abandoned and sold to pay the discharging costs. This was done in the only similar case on record in the case of *The St. Paul*, 271 F. 265 (1921), Second Circuit, and also in the unreported case *R. A. Crosby, et al., supra*, and the other unreported cases hereinafter set forth.

A case in point with the case at bar is the case of *St. Paul*, 271 F. 265 (2nd Cir. 1921). In that case the Court ordered the marshal to allow the Hudson Company to move

the seized vessel to Pier 32 and arranged for the discharge. The marshal never authorized the berthing of the vessel at Pier 32 and never promised to pay for it. The Hudson Company demanded preferential treatment or a superior lien for the payment of the wharfage. The Hudson Company had taken the ship to Pier 32 and kept it there for 82 days after it was empty. The Court stated that once the vessel was unloaded it should have been taken to a less expensive berth and therefore only allowed reasonable costs for berthing the vessel. Again wharfage was held to be an administrative expense and it was obvious for wharfage does help to preserve the res which is the ship itself and is a benefit to all the libellants. It is interesting to note that in the *St. Paul* case, *supra*, the Hudson Company, who took care of the unloading of the cargo, looked to the cargo (the cargo owners) for payment of the cost of discharging the cargo and the Court only allowed the owners of the cargo to discharge the cargo on the terms that the owner would provide a fund and pay Hudson for the unloading and caring of the goods. Thus, the cost of unloading the cargo was not incurred as an administrative expense, but was borne by the owners of the cargo, which should be borne in the case at bar by the owners of the cargo also.

The Courts below seem to entertain doubts as to their power to impose the discharging costs on the cargo owners. As has been shown, it is difficult to pergeive the basis for this. The cargo owners cannot abandon their baby (legal obligation) on the judicial doorstep without expecting that if and when they come to retrieve him at some future time, they will be charged with the cost of interim care and feeding. Cargo owners should pay for this benefit and if they do not the cargo should be sold to pay the expenses involved in its preservation. There is no doubt that in order to preserve the res and the fund that the Court has authority to do so.

It may be argued by the cargo owners that the ship could not be sold without the cargo being aboard it being removed.

There is no proof of this, nor was there any testimony or hearings held on this issue. The District Court merely concluded this. The fact that at the first attempted sale on June 4th, there was no bidders merely indicates that no one wanted to pay $250,000.00 for the ship. Certainly under the terms of the sale it was clear that the ship was being sold without cargo, and the cost of removing the cargo would not be imposed upon any purchaser. No hearing was ever held to justify this conclusion. The argument and conclusion are completely untenable.

Even if this argument were true, it would still not be valid for the cargo owners could not create an artificial benefit to the lienors by wrongfully refusing to claim their cargo to the detriment of the lienors.

The cost of unloading the cargo amounted to approximately $182,000.00. In addition to this, there were other marshal's expenses of approximately $12,000.00. The pier owner, Turner & Blanchard, Inc., has made a request for payment of wharfage in the sum of $107,000.00. Simple arithmetic shows that this totals $301,000.00. The proceeds of the sale was $250,000.00. Thus, by imposing the business obligation of the cargo owners on the other lienors, the proceeds of the sale, $250,000.00 have been wiped out, leaving nothing for other liens, such as seamen's wages, personal injuries, maintenance, etc., long held to be preferred liens, to be paid.

This not only changes long-standing practice, custom and law, but certainly is to the detriment of all lienors and not for the good of the common fund or res to be created in such a situation. In all the existing case law, reported and unreported, the cost of discharging cargo has always been the cargo owner's. In the *Poznan* case, *supra*, the marshal's bill of costs did not provide for the cost of removing the cargo. This is due to the fact that the cargo owner paid for the removal of the cargo. The same applied in the *St. Paul*, *supra*.

In summary, the Court has the power to do what is best for all lienors and preserve the fund and res. It has power to order the cargo owners to remove the cargo at its own expense and cost, otherwise consider the cargo abandoned. The owners have no right, to sit back, to the detriment of all others, and take the position, if you want us to remove the cargo, pay for it, and thus place themselves in a better position than other lienors.

The aforesaid shows that the removing of the said cargo is not really for the benefit of all the libellants or lienors and would merely be for the benefit of the cargo owners. The lienors should not be required to pay a normal business expense which should be incurred by the cargo owners.

(b) The *Poznan* case was improperly interpreted and extended by the Court of Appeals for the Second Circuit and would result in conflict and upheaval of long-established interpretations of law, custom and practices in the various circuit courts.

The Court of Appeals improperly interpreted and extended the doctrine of the *Poznan* case has just been made under Subdivision "(a)". The *Poznan* case merely set forth the standard or test to be used in deciding as to what constitutes a marshal's expense, namely, that service or property after the arrest of the ship for the common benefit of those interested, should be paid from the fund as an expense of justice or principles of equity. It then went on to say that wharfage is such service and should be a marshal's expense. This is all the *Poznan* case held. For years the Courts throughout the circuits have relied on the *Poznan* case, that wharfage is a marshal's expense and that is all it was cited for. The Court of Appeals decision was an improper extension and interpretation of the *Poznan* case. It will cause conflict among the various circuits. As has been demonstrated, up until the time of the determination of the Court of Appeals, there had been no holding whatsoever, that the cost of discharging cargo was for the benefit of the lienors

and should be a marshal's expense. The Courts throughout the land have legally and traditionally imposed this obligation on the cargo owners. The decision below now reverses this, even though in the *Poznan* case and *St. Paul* case, *supra*, the cost of discharging the cargo was paid by the cargo owner. In many unreported cases this procedure was followed. In the case of *J. F. O'Brien, et al.* v. *Theodorosa*, in the United States District Court, Eastern District of Michigan, Southern Division, Admiralty No. 19,545 (1959), the owner of a cargo of wheat paid the cost of discharging their cargo. (Copies of the orders in this unreported case are set forth as Appendix "J" on p. 28a.)

As indicated in Subdivision "(a)" of Point I of the Argument of this application, the cargo owners in the case of *Crosby* v. *S.S. Northern Wave*, were ordered to pay the cost of discharging their cargo. In another unreported case in the United States District Court, District of Maryland, *Jones* v. *Full Cargo of Manganese of Ore Aboard Pacific Venture*, Admiralty No. 4136 (1959), the cargo owner paid for the discharge of the cargo aboard the vessel. (A copy of the order in this unreported case is set forth as Appendix "K" on p. 35a.)

The English Admiralty and Maritime Courts have followed this procedure and practice. Although the English Maritime Law is not controlling in the American Courts, there is no doubt that the United States General Maritime Law was fashioned after the English law. In the English case of "Orion" reported in Vol. 62, Lloyd's Reports, pages 33-34 (1938), the Admiralty Division of the English Court held in such a situation as the case at bar, that the cost of discharging cargo was the owners' obligation. (A copy of this is set forth as Appendix "L" on p. 37a.)

One can readily see what chaotic effect the decision of the Court of Appeals would have upon long standing custom and practice of the Courts of the various Circuits and upon the interpretation of the existing law, namely the *Poznan*

case. It would appear that universally the practice has been for cargo owners to pay the cost of discharging their cargo. Up to the present case, no question has been raised, regarding the cost of discharging the cargo. Cargo owners have been paying the cost of discharging the cargo on a ship that has been liened and attached. There is not one reported case or unreported case, showing that cargo owners have had the lienors pay the cost of discharging cargo by having it declared a marshal's expense payable out of the proceeds of the sale of the ship. There is no doubt cargo owners will now seize upon the Court of Appeals decision in this case and insist, before removing their cargo, that the cost be held to be a marshal's expense. It is obvious that this conflict should be resolved by a decision of this Court otherwise problems and conflicts in the different circuits will result, and will result in conflict and upheaval of long-established custom, practice and law in the different circuits.

II

The decision, holding that the cost of discharging cargo of an attached vessel is a marshal's expense, changes the long-established law governing and regulating the order of priority of maritime liens to be satisfied out of an inadequate fund.

The Admiralty Courts in the past have been confronted with similar situations and over the years have evolved a system of class priority regulating the order in which maritime liens are to be satisfied out of a fund which is inadequate. The Courts have realized that in many situations there are not sufficient funds to pay all the lienors and to accord justice and equity it has set up the following system of priority in maritime payments:

> Class I: Marshal's fees and court-authorized expenses while the vessel is *in custodia legis* (this class is not considered a lien, but an administrative expense payable before all maritime liens);

Class II: The so-called "preferred maritime liens" under 46 U. S. Code, Sec. 953, which include (a) wage claims; (b) claims for salvage and general average; (c) claims "sounding in tort"; and (d) contract claims antedating a preferred ship mortgage which were not already barred by laches when the mortgage was recorded;

Class III: Claims based upon a valid preferred ship mortgage under the ship Mortgage Act, 1920, 46 U. S. Code, Sec. 911, et seq.

Class IV: All other contract and supply claims based upon maritime liens against the vessel; and

Class V: Non-lien claims against the vessel or her owner (See Gilmore and Black, *The Law of Admiralty*, p. 610, et seq., 55 Corpus Juris Secundum, *Maritime Liens*, pp. 754-7; Robinson on Admiralty, p. 52; *The City of Athens*, 83 F. Supp. 67, 789 (D. Md. 1949).

It is to be noted from the aforesaid schedule of payments that the intervening possessory cargo libellants have claims against the S.S. Emilia for a breach of a contract of affreightment and can file maritime liens to enforce and recover their claims for damages. The liens, however, fall in Class IV. It is quite obvious that due to the amount of other preferred liens that are filed against the S.S. Emilia that there would not be sufficient funds to pay all the liens. The cargo owners realize this and in a sense have devised a plan to elevate themselves from Class IV to Class I, by inducing the Court to order the cost of unloading their cargo as an administrative expense or marshal's fee payable out of the proceeds of the sale of the ship. Thus, their lien for damages for breach of affreightment, which is a Class IV category moves up to a Class I category all to the detriment of Class II and Class III lienors. Their action does not preserve the fund but depletes it. The decision below, in

effect, would change the long-established existing law regulating and governing the ranking and order of priority of maritime liens, so that the cargo owners with liens for breach of affreightment would no longer be in a Class IV category, but in a Class I category.

The cargo owners fully aware of where their liens stood under the long-established existing law, have changed it by claiming the cost of discharging cargo would enure to the benefit of all the lienors, be paid as a marshal's expense. They fully realize that if they did not accomplish this, their maritime lien would be for nondelivery of cargo and for damages for breach of contract for affreightment, would fall within Class IV. Ordinarly this is what cargo owners do. They would file a maritime lien for nondelivery of contract and breach of affreightment and would sue for damages arising from this. The cargo owners, well aware of the fact that the cost of discharging their cargo was prohibitive, in fact, $182,000, knew that the proceeds of the sale of the ship would not be adequate to pay Class II and Class III liens, let alone their liens which were Class IV. Instead of filing a maritime lien for nondelivery of cargo and breach of affreightment, refused to take off their cargo until they had assurance that the cost of discharging the cargo would be a marshal's expense. They steadfastly and dogmatically refused to remove their cargo, although they were given the right to do so, until they received assurance of it being declared a marshal's expense. This they did to the detriment of all other lienors. By accomplishing this, and having the Court of Appeals ruling in their favor, a Class IV lienor, who never would have had a chance to recover their damages, moves ahead into Class I and prohibits the lienors in Classes II and III from recovering from an inadequate fund.

The Courts have long recognized that seamen are wards of admiralty. Seamen's claims for wages, maintenance a. personal injuries have long been held to be prior preferred liens ahead of all other liens except marshal's expenses, which

were expenses as set forth in the *Poznan* case necessary to preserve the *res* or fund after a ship has been attached. The Courts realize that seamen's liens stem out of personal service towards a ship and should be high on the ladder of preferred liens to be paid ahead of other maritime liens. The rationale behind this is obvious. Seamen should be entitled to have their maritime liens for wages, personal injuries, maintenance, etc., arising out of actual employment and personal service (in other words a personal or human right) aboard ship, paid before business expenses and losses incurred by businessmen engaged in trade with the ship owner. The decision of the Court of Appeals wipes out this long standing procedure and law governing and regulating the order and priority of maritime liens, namely, a Class IV business lien becomes a Class I payment or lien ahead of seamen's personal liens. It is submitted that this was never intended to be the law and the Court of Appeals has in effect changed the law to the extent that it would now create conflict in the different circuits, unless this question is resolved by this Court.

The cargo owners' position that you have to remove the cargo in order to sell the vessel and create a fund is not tenable. The lack of logic in this argument was described in detail in Argument "I". It is sufficient to say here that cargo owners cannot refuse to claim their cargo and take the position that if you want to sell that ship or do anything with the ship, the cost of discharging their cargo must be paid by others. The Courts can order the cargo owner to discharge their own cargo or else remove it at their expense and declare it to be abandoned, if not claimed. This has been the practice in the past up until the present decision. Seamen's rights and liens should not be wiped out by an attitude of indifference and selfishness on the part of cargo owners who refuse to bear and shoulder their rightful business expenses.

It is interesting to note that the liening of a ship for maritime liens is not a new situation. This has been going on for years. Throughout the years there has been no decision directly in point. Based on the cases of *New York Dock Co.* v. *S.S. Poznan*, 274 U. S. 117, 47 Sup. Ct. 482, 71 L. Ed. 955 (1927), the *St. Paul*, 271 Fed. 265 (2nd Cir. 1921), and various unreported decisions set forth herein, cargo owners for years have realized that this is an expense which they should pay and have voluntarily paid this without raising the issue. This was the practice, custom and law. The cargo owners have changed the law by a clever and devious scheme and plan to change the long standing priority and order of maritime liens. The cargo owners have not submitted one case in existing law to substantiate their position. Cargo owners should not have the lienors pay their responsibility and their business obligations. They should pay these themselves. The discharge of the cargo would not inure to the benefit of all the lienors.

If the cargo owners wished to repossess their cargo they can do so, a right which they have been given a long time ago, but at their own expense and not at the expense of others.

III

The decision of the Court below in changing the long-established law governing and regulating the ranking and order of priority of maritime liens will create a conflict in the different circuits.

As has been previously demonstrated, the decision of the Courts below would clearly create conflict in the different circuits. As has been shown, in the *Poznan* and *St. Paul* cases, cargo owners have paid for the discharge of their cargo. It has been shown in the unreported cases and English Admiralty Courts, cargo owners have paid for the discharge of their cargo.

The decision below not only misinterprets and improperly extends the *Poznan* decision but also changes the priority of maritime liens. These priorities of maritime liens in a situation where there is an inadequate fund, when the vessel is attached, has been established over a long period of time. Definite rules of priority are essential so that the parties can at least know their rights in advance. The long-established existing law has provided for these rights and the present decision has ignored the long-established law governing and regulating the ranking and order of priority of maritime liens. Certainly the law and order of regulating maritime liens should not be upset and changed unless there are strong prevailing motives and reasons. There are no such reasons in the present case. In fact, seamen who have long been the wards of Admiralty Courts, have lost the protection of the Admiralty Courts by the decision below. The personal rights to be compensated for wages, personal injuries and disabilities arising in the course of employment and personal services performed aboard the ship have been wiped out. A business expense which should be borne by the cargo owner has been substituted ahead of these seamen's rights and liens. Up until the decision of the Court below all the Circuits have steadfastly held cargo owners responsible for the payment of discharging their cargo and have held seamen's personal liens to be a prior, preferred maritime lien, in a situation as the case at bar. The present decision, if it remains to stand, will cause conflict, chaos and turmoil. It is urgent that this most important conflict created by the decision below and also the misinterpretation and application of a decision of this Court, be resolved by this Court.

CONCLUSION

For the aforesaid reasons the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Second Circuit affirming the order of Mr. Justice Mishler, dated May 21, 1963, should be reversed.

Respectfully submitted.

ARTHUR ABARBANEL,
Attorney for Petitioners,
Lydon Webber, et al.,
250 West 57th Street,
New York 19, New York.

HOWARD SCHULMAN,
of Counsel.

Dated: September 9, 1963.

Certification of Service

This is to certify that on the 10th day of September, 1963, that I have served true and correct copies of the following petition by first class mail upon counsel for the respondents as follows:

Solicitor General of the United States,
Attorney for United States of America,
Washington 25, D. C.;

Joseph P. Hoey, Esq.,
United States Attorney,
Admiralty and Shipping Section,
Department of Justice,
Attorney for United States of America,
42 Broadway,
New York, New York;

Kirlin, Campbell & Keating, Esqs.,
Attorneys for Caltex (India) Ltd.,
120 Broadway,
New York, New York;

Dunn & Zuckerman, Esqs.,
Attorneys for Pan Islamic S.S. Co. Ltd.
Government of Pakistan,
17 Battery Place,
New York, New York;

Hill, Betts, Yamaoka, Freehill & Longcope, Esqs.,
Attorneys for Maritime Food Corporation,
26 Broadway,
New York 4, New York;

Foley & Grainger, Esqs.,
Attorneys for Merritt, Chapman & Scott Corp.,
26 Broadway,
New York 4, New York;

Julius Goldstein, Esq.,
Attorney for Turner & Blanchard, Inc.,
150 Broadway,
New York, New York.

ARTHUR ARABBANEL,
Attorney for Petitioners Lydon Webber, et al.

Appendix "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 411—October Term, 1963

(Argued June 20, 1963 Decided June 28, 1963)

Docket No. 28293

TURNER & BLANCHARD, INC.,

Libellant, Appellee,

v.

THE S.S. EMILIA and A. H. BULL STEAMSHIP CO., *et al.*,

Respondent,

LYDON WEBBER, *et al.*,

and

MARITIME FOOD CORPORATION,

Appellants.

Before:

MOORE, HAYS and MARSHALL, *Circuit Judges.*

Appeals from so much of an order of the United States District Court for the Eastern District of New York, Jacob Mishler, Judge, ordering that the cost of unloading the cargo from the S.S. Emilia shall be a Marshal's expense to be paid out of the proceeds of the sale of the vessel. Affirmed.

Appendix "A"

HOWARD SCHULMAN, New York, N. Y. (Arthur Abarbanel, of counsel), *for appellants Lydon Webber, et al.*

DAVID I. GILCHRIST, New York, N. Y., *for appellant Maritime Food Corporation.*

FOLEY & GRAINGER, New York, N. Y. (Walter A. Darby, Jr., Robert P. Whelan, of counsel), *for appellant Merritt-Chapman & Scott Corporation.*

JULIUS S. GOLDSTEIN, New York, N. Y., *for appellee Turner & Blanchard, Inc.*

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Clement C. Rinehart, of counsel), *for appellee Caltex (India) Ltd.*

DUNN & ZUCKERMAN, New York, N. Y. (James F. Dunn, of counsel), *for appellee Republic of Pakistan.*

LOUIS E. GRECO, Attorney in Charge, Admiralty and Shipping Section, Department of Justice, New York, N. Y. (Joseph P. Hoey, United States Attorney for the Eastern District of New York, Brooklyn, N. Y., of counsel), *for appellee United States of America.*

PER CURIAM:

Order of May 21, 1963, insofar as appealed, affirmed. "Service rendered to the ship after arrest, in aid of the discharge of cargo, and afterwards pending the sale, necessarily inured to their [lienors] benefit, for if contributed to the creation of the fund [now] available to them." The district court had jurisdiction "to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it." (*Id.* at 121) *New York Dock Co. v. The Poznan*, 274 U. S. 117, 121 (1927). The district court is requested to proceed with all reasonable and feasible dispatch. Mandate shall issue forthwith.

Appendix "B"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A 262

TURNER & BLANCHARD, INC.;

Libelant,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Order

Upon the libels filed against the vessel Emilia, now in the custody of this Court pursuant to process issued in rem (or in personam), upon the motion of Turner & Blanchard, Inc. appearing by its proctor, Julius L. Goldstein, upon the annexed affidavits of Scott Blanchard, Jr. and Julius L. Goldstein, and upon all the proceedings heretofore had and the papers filed, it is

ORDERED that the several libelants set forth in the schedule attached to the affidavit of Julius L. Goldstein, and the S.S. Emilia, her owners, operators and charters show cause before the undersigned Judge of this Court at Room 323 of the United States Courthouse, Borough of Brooklyn, City of New York, on the 26th day of April, 1963 at 10 A.M., or as soon thereafter as counsel can be heard, why this Court should not direct either the removal of the said vessel from Pier 21 where she is now berthed or the sale of the said vessel and make such other order as may be appropriate in the premises, and it is further

Appendix "B"

ORDERED that service of a copy of this order together with a copy of the affidavits annexed hereto, upon the Marshal of this district, upon the proctor or proctors for each of the respective libelants set forth in the schedule annexed to the affidavit of Julius L. Goldstein sworn to March 23, 1963, shall be good and sufficient service if made by mail to the office of each of the said proctors, on or before the 24th day of April, 1963, and it is further

ORDERED that publication of notice of the aforesaid process shall not be required and that the Marshal of this district shall be furnished an extra copy of this order which shall be affixed in a conspicuous place on said S.S. Emilia, which affixing shall be affected by the Marshal on or before the 24th day of April, 1963 at 5 P.M.

Dated: Brooklyn, New York, April 23, 1963.

JACOB MISHLER,
United States District Judge.

Appendix "B"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A 262

TURNER & BLANCHARD, INC.,

Libelant,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Affidavit of Scott Blanchard, Jr.

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

SCOTT BLANCHARD, JR., being duly sworn, deposes and says:

1. I am the President of Turner & Blanchard, Inc., lessee and operator of the dock terminal at 21st street, Brooklyn, New York, where the S.S. Emilia is berthed.

2. Since mid-December, 1962 the Emilia, an American-flag cargo vessel has been berthed at the said pier fully loaded with about 8500 tons of out-bound cargo consigned to more than two hundred consignees in various ports abroad.

3. On February 28, 1963 Turner & Blanchard, Inc. filed a libel in this Court for wharfage and other services rendered to the vessel Emilia while in custodia legis.

Appendix "B"

4. Thereafter A. H. Bull Steamship Co. served a notice of appearance through its proctors, Messrs. Poles, Tublin & Patestides; but it has not served or filed an answer to the said libel. Its time to do so has expired and has not been extended by stipulation or otherwise.

5. As appears from the annexed affidavit of Julius L. Goldstein, as of the present time thirty separate libels have been filed against the Emilia and her owner both in this district and in the United States District Court for the Southern District of New York. The vessel has been attached by the Marshals of both districts and the libels cover almost every type of maritime claim. It is not possible to make even a rough estimate of the ultimate provable value of the in rem claims filed and these claims will exceed the amount of any proceeds of the Emilia's sale by the Marshal.

6. This affidavit is submitted in support of an application for an order directing the Marshal to move or sell the vessel Emilia because (a) the expense of keeping her where she is, is too great; (b) if she is kept berthed at Pier 21 indefinitely most if not all of the proceeds will be consumed in wharfage with consequent impairment of the security of the lien; and (c) it is inequitable to deprive Turner & Blanchard, Inc. of use of the wharf where the Emilia is berthed.

7. On March 20, 1963, on the basis of intervening possessory libels filed by the United States of America, the Republic of Pakistan, and by Caltex (India) Ltd., as owners of cargo aboard the Emilia, said libelants moved this Court for summary relief, (1) directing that the Marshal of this Court discharge the parcels of cargo described in their respective libels, from the Emilia, and deliver to each of them the parcels of cargo specified; (2) directing that all fees of the Marshal and expenses necessarily incurred by him in the dis-

charge and delivery of the said parcels of cargo be deemed to be the Marshal's expenses and allowed by the Court against the Emilia, or her proceeds; and (3) directing that the said expenses, charges and costs shall have priority over all liens.

8. The motion came on to be heard before Hon. George Rosling, who after extensive argument, on March 21, 1963, reserved decision.

9. The United States of America, as one of the said libelants, insisted that it wanted judicial permission to immediately move the ship and remove its cargo. Judge Rosling stated that since there was no objection to such relief an order to that effect containing the proper safeguards for the removal of the ship and its cargo might be settled, but that the question of whether or not the cost of removal of the cargo would be assessed against the proceeds of the sale of the vessel on the basis requested would await future determination. The Government has taken no further steps to implement its request and Judge Rosling has made no formal determination of the said motion.

10. That portion of Pier 21, of which Turner & Blanchard, Inc. is landlord and operator, contains accommodations for three vessels: berths A, B and C respectively. Since mid-December as aforesaid the Emilia has been docked in Berth C and Turner & Blanchard, Inc. has been supplying electricity to prevent deterioration of perishables under refrigeration on board.

11. The expense of wharfage, which has priority as a lien, if continued indefinitely may grow out of proportion to the proceeds which may be realized from the sale of the Emilia. We have respectfully suggested that the Emilia be moved to minimize the expense but nothing has been done about moving her.

Appendix "B"

12. Turner & Blanchard, Inc. is in the stevedoring business and it is losing the benefit of operating revenue from the use of the space occupied by the Emilia, at an expensive berth in an active dock facility.

13. The recent Longshoreman's strike started on December 23, 1962 and ended January 26, 1963. In the twelve week period before the strike our volume of business was about $884,000.00, and in the same period since the strike ended our volume of business has been about $549,000.00. These figures alone demonstrate the continuing detriment to which we are exposed.

14. The sale or removal of the Emilia now would keep down the administrative expense, provide as much security as possible for all preferred lienors and be equitable to Turner & Blanchard, Inc.

15. No previous application, except as aforesaid, has been made for this relief to this or any other Court or Judge.

WHEREFORE, we respectfuly ask for the indicated relief.

(Sworn to by Scott Blanchard, Jr., on April 23, 1963.)

Appendix "B"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A 262

TURNER & BLANCHARD, INC.,

Libelant,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Affidavit of Julius S. Goldstein

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

JULIUS L. GOLDSTEIN, being duly sworn, deposes and says:

As proctor for Turner & Blanchard, Inc. I have examined the card indices and the dockets of the Admiralty Clerk of this Court and the Southern District of New York and the names contained in the schedules annexed to and made part hereof comprise all libels filed in said courts against the vessel Emilia.

(Sworn to by Julius L. Goldstein on April 23, 1963.)

Appendix "B"

Schedule, Annexed to Foregoing Affidavit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

CASE NO.	PROCTORS	LIBELLANT
63 A 180	Burlingham, Underwood, Barron, Wright & White, Esqs. 26 Broadway New York, N. Y.	Chemical Bank New York Trust Company
63 A 217	Foley & Granger, Esqs. 26 Broadway New York, N. Y.	Merritt, Chapman & Scott Corp.
63 A 209	McHugh & Leonard, Esqs. 150 Broadway New York, N. Y.	George Karr Co., Inc.
63 A 197 63 A 198 63 A 199	Howard Schulman, Esq. 250 West 57th Street New York, N. Y.	Lydon Webber, et al. Joseph P. Glynn Russell H. Brandon
63 A 212	James Wheeler Forsyth, Esq. 42 Richmond Terrace Staten Island, New York	David Douglas
63 A 429 63 A 245	Bigham, Englar, Jones & Houston, Esqs. 99 John Street New York, New York	C. C. Galbraith & Son Inc. Ploog & Herrman
63 A 338 62 A 1321	Miller & Seeger, Esqs. 400 Madison Avenue New York, N. Y.	E. Gherman Joseph Ardello

Appendix "B"

Case No.	Proctors	Libellant
63 A 300	Kramer, Marz, Greenlee & Backus, Esqs. 29 Broadway New York, N. Y.	International Maritime Supplies Co., Ltd.
62 A 1137	Klousky & Sergi, Esqs. 66 Court Street Brooklyn, New York	John Trapani
63 A 180	Dunn & Zuckerman, Esqs. 17 Battery Place New York, N. Y.	Pan Islamic S. S. Co. Ltd. Government of Pakistan, et al.
63 A 256	Lee Pressman, Esq. 60 Broadway New York, N. Y.	W. G. Mullins, et al.
	Poles, Tubin & Patestides, 37 Wall Street New York, N. Y.	A. H. Bull Steamship Co.
63 A 367	Joseph P. Hoey, Esq. United States Attorney Louis E. Greco, Esq. Attorney in Charge Admiralty & Shipping Section 42 Broadway New York, N. Y.	United States of America Commodity Credit Corp.
	Kirlin, Campbell & Keating, Esqs. 120 Broadway, N. Y. New York, N. Y.	Caltex (India) Ltd., et al.
63 A 373 63 A 243 63 A 374	Healy, Baillie & Burke, Esqs. 52 Wall Street New York, N. Y.	The Israel Discount Bank, Ltd. Victoria Pisano Agencies Marine Midland Trust Co. of New York

Appendix "B"

Case No.	Proctors	Libellant
63 A 139	Harold A. Taft, Esq. 32 Broadway New York, N. Y.	Marine Tobacco Co.
62 A 1185	Bigham, Englar, Jones & Houston, Esqs. 99 John Street New York, N. Y.	International Department Stores
63 A 53	Grist, Cannata & Launer, Esqs. 156 William Street New York, N. Y.	General Ship Repair Co.
63 A 221	Sheldon Tabak, Esq. 38 Park Row New York, N. Y.	Jan R. Mucins
63 A 187 63 A 188	Robert E. Delaney, Esq. 630 Fifth Avenue New York, N. Y.	Hubeva Marine Plastics, Inc. Parsons Refractory Corp.
63 A 63	Sheinman, Albert & McLean, Esqs. Time & Life Bldg. New York, N. Y.	Maritime Food Corp.
62 A 1345	Goldstein & Sterenfeld, Esqs. 32 Broadway, N. Y. C.	Levi C. Smith
62 A 869	Kelly, Donovan, Robinson & Maloof, Esqs. 70 Pine Street New York, N. Y.	Universal Clothing Co.

Appendix "C"

63 A. 262

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

TURNER & BLANCHARD, INC.,

Libelant,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Order

A motion having been duly brought on before this Court for an order either to remove the S.S. Emilia from Pier 21, Brooklyn, New York, where she is now berthed or for the sale of said vessel, and proctors for libelants and all other interested parties having been duly heard, and the Court after due deliberation having orally announced its decision on May 10, 1963, it is

ORDERED that the S.S. Emilia, her engines, boilers, tackle and appurtenances, but not including any cargo on board said vessel, be sold by the Marshal of this District through Jack J. Duberstein, Auctioneer, on 6 days' public notice and that a vendition exponas issue accordingly; and it is further

ORDERED that the Marshal deposit the proceeds of such sale into the registry of this Court to be held subject to the further order of this Court.

Dated: Brooklyn, New York.
May 13th, 1963.

JACOB MISHLER,
U. S. D. J.

Appendix "D"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A. 262

TURNER & BLANCHARD, INC.,

Libelant.

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Order

An Order having been entered in this proceeding on May 13, 1963, directing the Marshal of this Court to sell the S.S. Emilia exclusive of cargo; and it appearing to the satisfaction of the Court that further directions are necessary to consummate the sale and that the sale should be adjourned, it is

ORDERED that the date of sale of the S.S. Emilia be postponed from May 22, 1963, to May 28, 1963, at the same time and place as provided in the Order of May 13, 1963, and it is

FURTHER ORDERED that bids at such sale shall start at $250,000.00 but that the acceptance of the successful bids shall be subject to the approval and confirmation of the Court, and it is

FURTHER ORDERED that if the sale take place as ordered, title shall pass to the successful bidder as soon as practicable

after the cargo has been unloaded but not later than thirty (30) days from the date of sale, and it is

FURTHER ORDERED that the vessel be sold free of cargo, and it is

FURTHER ORDERED that the cost of unloading the cargo shall be a Marshal's expense of the sale of said vessel and the Marshal is hereby authorized to receive advances to effect discharge of cargo and to repay such advances out of the proceeds of sale of said vessel, and it is

FURTHER ORDERED that to carry out the terms of this order the Marshal is authorized to move the said vessel to any facility within the jurisdiction of this Court and to contract for the unloading of the cargo and that the costs of the moving of the vessel shall be a Marshal's expense of sale and that the Marshal shall be held harmless from any liability in connection with the moving of said vessel, and it is

FURTHER ORDERED that the wharfage charges to the date of delivery of said vessel pursuant to said order shall be a Marshal's expense of sale, and it is

FURTHER ORDERED that the Marshal is authorized to insure the vessel against normal marine port risk and the premiums for such insurance shall be a Marshal's expense of sale.

Dated: Brooklyn, New York,
May 21, 1963.

JACOB MISHLER,
U. S. D. J.

Appendix "E"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A. 262

TURNER & BLANCHARD, INC.,

Libelant,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Order

An order having been entered in this proceeding on May 13, 1963, directing the Marshal of this Court to sell the S.S. Emilia; and a further order having been entered herein on May 22, 1963, which among other things, postponed the date of sale of the S.S. Emilia from May 22, 1963 to May 28, 1963, at the same time and place as provided in the order of May 13, 1963 and sufficient reason appearing it is, BY THE COURT

ORDERED that the sale of the S.S. Emilia be postponed from May 22, 1963 to June 4, 1963, at the same time and place as provided in the order of May 13, 1963, and that all other provisions contained in the order entered May 22, 1963, remain in full force and effect, and it is

FURTHER ORDERED that the Venditioni Exponas made returnable May 19, 1963 be adjourned to June 12, 1963.

Dated: Brooklyn, New York.
May 22, 1963.

JACOB MISHLER,
U. S. D. J.

Appendix "F"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A. 262

TURNER & BLANCHARD, INC.,

Libelant,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Order

United States Marshal of this District having moved this Court for an order directing the Clerk of this Court to turn over to the Marshal all necessary funds out of the proceeds of sale of the SS Emilia presently in the registry of this Court, to discharge all obligations and liabilities incurred or claims made while said vessel was in the custody of the Marshal, including but not limited to the cost of discharging cargo for the SS Emilia and all expenses connected therewith and all fees, costs and expenses incident to the sale of the said vessel, the amount of which are set forth in the Marshal's Bill of Costs and supporting bills filed by the Marshal in the Clerk's office on August 5, 1963; and said motion having duly come on to be heard before me on August 7, 1963, and it appearing that the Marshal's fees, costs and expenses total $192,176.62; and the Court after due deliberation having granted said motion, it is by the Court

Appendix "F"

ORDERED that said motion be and the same hereby is in all respects granted, and it is

FURTHER ORDERED that the Clerk of this Court be and he hereby is directed to turn over, out of the proceeds of the sale of the SS Emilia, to the Marshal of this District the sum of $192.176.62 to cover the Marshal's fees, costs and expenses as set forth in his Bill of Costs filed with the Clerk of this Court, and it is

FURTHER ORDERED that upon application ex parte to this Court, an order may be entered directing the Clerk to turn over, out of the proceeds of sale of the SS Emilia, to the Marshal any further amounts necessary to pay any bills arising out of the unloading and sale of the SS Emilia which were not included in the Marshal's Bill of Costs heretofore filed with the Clerk of this Court, and it is

FURTHER ORDERED that the direction to turn the monies over to the U. S. Marshal is hereby stay until Aug. 9, 1963 at 11:00 A. M.

Dated: Brooklyn, N. Y.
August 7, 1963

JACOB MISHLER
U. S. D. J.

Appendix "G"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

TURNER & BLANCHARD, INC.,

Libellant-Appellee,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents,

LYDON WEBBER, *et al.*, MARITIME FOOD CORPORATION,

Appellants.

Order

The appellants herein having made a motion for an order: 1) Staying that portion of part of the ancillary order of Judge Mishler, dated August 7, 1963 directing that the Clerk of the United States District Court for the Eastern District of New York turn over to the Marshal of the said District, the proceeds of the sale of the S.S. Emilia to the said Marshal to pay Marshal's expenses incurred in connection with the cost of discharging the cargo of the S.S. Emilia, which order was issued pursuant to and as a result of the mandate of this Court in the above entitled action entered and filed on July 1, 1963; (2) for a recall of a mandate of this Court issued and filed on or about July 1, 1963, and for a stay of its reissuance pending application for a petition for writ of certiorari to the United States Supreme Court requiring review of this Court's decision and mandate.

Appendix "G"

The said motion having duly come on to be heard on August 8, 1963; and after hearing argument on behalf of the respective parties and after due deliberation it is hereby

ORDERED that appellants' application for a stay of the order of Judge Jacob Mishler dated and filed August 7, 1963 and for the recall of the mandate of this court and the stay of the reissuance of a mandate of this court, is hereby denied, and it is further

ORDERED that the appellants shall have the right to apply to the Supreme Court of the United States on or before August 14, 1963 for a stay, as requested in this application, and in the event that no such application shall be made or in the event that the Supreme Court shall not have granted a stay by August 14, 1963, this order denying appellants' application shall become effective.

Dated: New York, New York
August 8, 1963

LEONARD P. MOORE
THURGOOD MARSHAL
U. S. C. JJ.

Appendix "H"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A 262

June 7, 1963

TURNER & BLANCHARD, INC.,

Libelant,

against

A. H. BULL STEAMSHIP CO., *et al.*,

Respondents.

Nunc pro Tunc Memorandum Decision

By order dated May 13, 1963, the S.S. Emilia was ordered sold. By order dated May 21, 1963, the sale was adjourned to May 28, 1963. Upon notice to all the interested parties of the settlement of the said order, objection was made by some to the provision in the order directing that the cost of discharging the cargo aboard the vessel be considered a Marshal's expense of the sale and that it be paid out of the proceeds of the sale. By order dated May 22, 1963, the sale was adjourned to June 4, 1963, and the vessel was offered for sale on the latter date. The Court has been advised that no bids were made after due publication and due notice of the sale. The order of May 21, 1963 provided that title to the vessel was to pass to the successful bidder after the cargo was discharged.

The Court finds that the presence of cargo aboard has an adverse effect on the sale to the detriment of all parties who have an interest, claim or lien in the vessel. The propriety of charging the cost of discharging the cargo against

the proceeds of the sale as an administrative expense again arises.

The Court, at the time of the issuance of the order of May 21, 1963, informally expressed its reasons for considering the cost of discharging the cargo as an administrative expense and takes this opportunity to formally set them forth.

The cargo is lawfully and rightfully aboard ship. The owner of the vessel did not have the right to direct removal of the cargo at the expense of the owners of the cargo. *The St. Paul*, 1921, SDNY, 277 F. 99, 107. The sale of the owner's interest in the vessel cannot serve to vest a greater right than the owner had, nor can it impose an additional liability on the cargo owners.

Discharge of the cargo is a service furnished on authority of the Court and should be paid out of the proceeds of the sale as an "expense of justice." *The Poznan*, 1927, 274 U. S. 117, 121, 47 S. Ct. 482, 484. Since the vessel is *in custodia legis* the charge against the fund is not a lien. The right of the Court to direct payment of such charges before pre-custodial liens is stated in *Gilmore and Black, The Law of Admiralty*, p. 497, as follows:

> "* * * if equity and good conscience require that they be paid in priority to pre-custodial claimants who do have liens, the admiralty court may properly decree the prior payment."

This opinion is ordered filed as of May 21, 1963, nunc pro tunc.

JACOB MISHLER,
U. S. D. J.

Appendix "I"

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

No. 149 of 1920

In Admiralty

R. A. CROSBY, *et al.*

vs.

STEAMSHIP "NORTHERN WAVE"

Order

AND NOW, to wit: this 31st day of January A. D., 1921, upon hearing and considering the written suggestion of the Marshal for this District this day presented in open Court, it is ordered, that the sale of the steamship "NORTHERN WAVE" her engines, boilers, and machinery, tackle, apparel, and furniture, made by the U. S. Marshal on January 26, 1921, be and the same is hereby set aside and vacated, and the Marshal is directed to return forthwith to the United States Shipping Board the sum of $10,000 deposited by said Shipping Board on account of the purchase price; and further, that the Marshal be and he is hereby directed to notify the owner of the cargo of coal laden on board said vessel to discharge the same, and upon the owner's failure to do so promptly, or if the owner of said coal cannot be found in this District, the Marshal be and he is hereby directed to discharge and store the same at the expense and risk of said coal and its owner; and further, that no alias writ of sale be directed to the Marshal to re-call said steamship, her engines, boilers and machinery, tackle, apparel and furniture until the cargo has been discharged or until further order of this Court.

J. W. THOMPSON,

Judge.

Appendix "I"

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

No. 150 of 1920

WILLIAM DREW

vs.

S.S. NORTHERN WAVE

Order

And now February 19, 1921—

It appearing to the Court that certain libels have been filed in this Court against the Steamship "Northern Wave" her engines, boilers and machinery, tackle, apparel and furniture, and that process thereunder has been issued and the said Steamship having a cargo of coal ladened aboard, has been attached under process of this Court and is in its possession;

And it further appearing that on January . 1921, an order of sale was entered by the Court directing the sale of the said Steamship "Northern Wave" by the Marshal; that on January 26, 1921, the sale thereof was made by the Marshal for the sum of $10,000; that on January 31, 1921, the Court declined to confirm the said sale and entered an order directing the Marshal to notify the owners of the cargo of coal to discharge the same and that upon their failure to do so promptly, or if they cannot be found in this district, that the Marshal discharge the said cargo at the expense and risk

of the said cargo and its owner; and it appearing that the cargo owners and their representatives have failed to take any action.

And it further appearing that the said cargo and vessel are liable to losses and damages and destruction by fire from spontaneous combustion and otherwise; that by reason thereof the said cargo and ship respectively are perishable as also by reason of chargeableness and deterioration while in the custody and possession of the Court; that it is necessary to unliver the ship of the cargo, thus permitting full and proper inspection of the ship for the purposes of her sale.

And it further appearing that counsel representing various interests have appeared before the Court and the Court has heard and considered the argument as to the advisability of selling or discharging the cargo and the selling of the said vessel without delay;

It is now ordered, and decreed by the Court:

First—That the Marshal be and he hereby is directed to sell at public sale the cargo of coal laden on board said Steamship "Northern Wave" after six days notice by hand bills publicly posted and three days of advertisement in the Philadelphia Record and the Philadelphia Enquirer, and that the proceeds of the sale be paid into the Registry of the Court; that said sale be made subject to the terms and conditions as follows:

(a) That the purchaser shall fully and completely unladen the cargo from the said vessel within six days after the confirmation of the sale by the Court.

(b) That the purchaser of the said cargo, at his risk and expense, and upon such terms as shall be approved by the Marshal, shall have the privilege of moving said steamship to any proper dock or wharf within the District for the purpose of unladening the same.

Appendix "I"

Second—That a writ of survey and appraisement may issue directed to John W. Morratt and W. Roberto Cameron commanding them to survey and value and appraise the said cargo and make report thereof to the Court.

Third—That the Marshal of this Court be and he hereby is authorized to sell at public sale, the said Steamship "Northern Wave," its boilers, engines and machinery, tackle, apparel and furniture, at a time to be fixed by the Marshal not earlier than six days after the sale and time for the unlading of the cargo, as hereinbefore provided, due notice of such sale to be given, and in addition by notice published three times in one newspaper in the cities of New York, Boston and Baltimore; that the proceeds of such sale be paid by the Marshal into the Registry of the Court.

Provided, however, that in the event of the Marshal being unable to secure a purchaser for the coal at the sale thereof herein ordered, the Steamship "Northern Wave" shall be sold by the Marshal as she then lies and in all respects as though no order for sale of the cargo had been entered, it being the intention of the Court that the sale of the ship by the Marshal shall not be delayed by reason of inability to sell the coal.

Fourth—That the Order of Court, entered January 26, 1921, in so far as the same is inconsistent with this order be rescinded.

J. W. THOMPSON
Judge.

Appendix "I"

IN THE DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF PENNSYLVANIA

In Admiralty

No. 150 of 1920

WILLIAM DREW

vs.

STEAMSHIP NORTHERN WAVE

Order Affirming Marshal's Sale

AND NOW TO WIT this 2nd day of March A.D. 1921 the marshal having made his return of the order of sale issued in the above case, that after due advertising he exposed the cargo of the above vessel at public sale in accordance with the order of this court heretofore entered and did sell the same at such public sale on the 28th day of February 1921 to one S. C. Loveland for the price or sum of 25 cents per ton, that being the best price offered for the same at said sale, It is hereby ORDERED, ADJUDGED AND DECREED that said sale of said cargo so made to the said S. C. Loveland at the price of 25 cents per ton be confirmed and the marshal is directed to deliver to said S. C. Loveland a proper Bill of Sale for the same as well as possession of the said cargo of coal.

J. W. THOMPSON, J.

Appendix "J"

UNITED STATES OF AMERICA

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
IN ADMIRALTY

No. 19,545

J. F. O'BRIEN, JR., and FUEL OIL CORPORATION, an Ohio corporation,

Libelants,

vs.

The Panamanian S.S. THEODOROS A, her engines, boilers, etc.,

Respondents.

MOTION BY OWNERS OF CARGO FOR AN ORDER DIRECTING THE UNITED STATES MARSHAL AT DETROIT, MICHIGAN, TO SUPERVISE THE TRANSFER AND UNLOADING OF THE CARGO CONSISTING OF APPROXIMATELY 174,563 BUSHELS OF PERISHABLE WHEAT, AND UPON COMPLETION OF UNLOADING, TO SUPERVISE THE IMMEDIATE RETURN OF VESSEL TO ITS PRESENT PIER; MOTION FOR AN ORDER DIRECTING UNITED STATES COLLECTOR OF CUSTOMS AT DETROIT TO SUPERVISE LOADING OF CARGO INTO RAILWAY CARS FOR SHIPMENT TO BALTIMORE, MARYLAND, TO BE FROM BALTIMORE TRANSSHIPPED TO CONSIGNEE IN VENEZUELA, ALL SUCH ACTION TO BE UNDERTAKEN UNDER SUCH TERMS AND CONDITIONS AS COURT MAY SPECIFY.

To the Honorable Judges of said Court:

Now comes claimant, International Milling Company, a Delaware Corporation, having its general office in Minneapolis, Minnesota, and its subsidiary, Robin Hood Flour Mills, Limited, a corporation of Canada, which has its head office at Moose Jaw, Province of Saskatchewan, by Miller, Canfield, Paddock and Stone, its Proctors, and shows unto this Honorable Court as follows:

Appendix "J"

1. That the claimants are the owners of perishable wheat consisting of approximately 174,563.7 bushels, which forms the cargo of the Panamanian S.S. Theodoros A, which vessel is now in the custody of this Honorable Court pursuant to a writ of attachment issued by and out of this Court to the United States Marshal at Detroit, under the libel heretofore filed by J. F. O'Brien, Jr. and Fuel Oil Corporation, an Ohio corporation, the aforementioned libelants.

2. That said cargo of wheat has a value of approximately $350,000.00—the United States wheat in said cargo consisting of approximately 111,921.4 bushels was loaded at Duluth, Minnesota, in said vessel on or about October 31, 1959, and the Canadian wheat from said cargo, consisting of approximately 62,642.3 bushels was loaded in said vessel at Fort William, Ontario, Canada, on or about November 3, 1959. All of said cargo was for shipment to Melinos Nacionales, C.A. at Purto Cabello (as to United States wheat), and Port of Maracaibo, Venezuela (as to the Canadian wheat), and the freight to the destination has been paid in full in the amount of approximately $48,000.00, as will more fully appear from the Bills of Lading as to the wheat (Exhibit A); and from the affidavit of P. N. Ness, a vice president of both said International Milling Company and said Robin Hood Flour Mills, Limited (Exhibit B).

3. That as will more fully appear from the affidavit of P. N. Ness, neither International Milling Company nor Robin Hood Flour Mills, Limited, owns any interest, financial or otherwise, in the Panamanian S.S. Theodoros A, other than such claims as said corporations, or either of them, may have in connection with the prepayment of the freight on said wheat, as aforementioned, and the expense attendant to the transportation of said wheat to its destination in Venezuela, which said claims in all probability will be presented against said vessel at some later date.

4. That the announcement has been made to the effect that the St. Lawrence Seaway will close on November 30,

1959, and even though such date of closing may be extended for a few days beyond such time, nevertheless there is not sufficient time remaining before such closing to get the cargo through the Seaway, even assuming that all legal and other obstacles were cleared away.

5. That it is imperative that the cargo, to prevent the spoilage and deterioration thereof, be removed from the Panamanian S.S. Theodoros A, as will appear from the telegram received by Robin Hood Flour Mills, Ltd., and sent by the Master of said vessel, which telegram is attached hereto and marked Exhibit C.

NOW, THEREFORE, Milier, Canfield, Paddock and Stone, Proctors for International Milling Company and Robin Hood Flour Mills, Limited, pray that this Honorable Court Order:

(a) The perishable wheat, constituting the cargo of the Panamanian S.S. Theodoros A, be removed therefrom forthwith, and to effect such removal the United States Marshal at Detroit employ a tug or tugs sufficient in his opinion safely to move said vessel from its present pier to the Mill of the International Milling Company, situated at 323 East Atwater Street, Detroit. Such unloading to take place under the supervision of said Marshal, the United States Collector of Customs at Detroit also to be present at such unloading, and when said work has been completed said Marshal to return said vessel by use of tug or tugs to its present pier, said Marshal in such moving and returning to decide as to the number of officers and crew of said vessel as he may feel are needed to stand by their posts.

(b) The United States Collector of Customs at Detroit to supervise the loading of the said cargo into railway cars for shipment to Baltimore, Maryland, to be from there transshipped, under the supervision of the Collector of Customs at Baltimore, to Molinos Nacionales,

C. A., the consignee, the forfeiture provisions as set forth in Title 46 U. S. C. A., Chapter 24, Section 883, to be waived.

(c) International Milling Company and/or its subsidiary, Robin Hood Flour Mills, Limited, to advance to the United States Marshal at Detroit such monies as are reasonably necessary to cover the cost of transferring said vessel from its present pier to said company's Mill and return to its present pier after completion of said unloading, and further to advance the cost of the railway transportation and other charges as may be attendant upon transporting said cargo to said consignee in Venezuela. Further, upon completion of their duties as herein directed, the officers of the Court to be paid for their costs and charges in conformity with Rule Fifty-seven (57) of the Rules of Practice in Admiralty cases, such monies to be advanced by said International Milling Company and/or Robin Hood Flour Mills, Limited, the amount of such costs and charges to be determined at a later date by this Court.

MILLER, CANFIELD, PADDOCK AND STONE,

By /s/ LAWRENCE S. KING
By /s/ GEORGE E. BUSHNELL, JR.
Proctors for International Milling Company and Robin Hood Flour Mills, Limited,
3456 Penobscot Building,
Detroit, 26, Michigan.

Dated: December 1, 1959.

IT IS SO ORDERED:

.....
ARTHUR F. LEDERLE
United States District Judge

Appendix "J"

UNITED STATES OF AMERICA
IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN ADMIRALTY
No. 19,545

J. F. O'BRIEN, JR., and FUEL OIL CORPORATION, an Ohio corporation,

Libelants,

vs.

The Panamanian S.S. THEODOROS A. her engines, boilers, etc.,

Respondents.

AMENDMENT TO ORDER GRANTED DECEMBER 1, 1959, RESPECTING REMOVAL OF CARGO ON VESSEL.

At a session of the above named Court held in the Federal Building, in the City of Detroit, County of Wayne, Michigan, on this 4th day of December, A. D. 1959.

Present:

HON. ARTHUR F. LEDERLE, *District Judge.*

A Motion having been filed in this Court and cause by claimants, International Milling Company, a Delaware Corporation, and its subsidiary, Robin Hood Flour Mills, Limited, a corporation of Canada, whose appearance has heretofore been entered in this proceeding, and upon argument having been made in open Court on December 1, 1959 by the Proctors, for said claimants; and

This Court on said date having entered an order authorizing the moving of the vessel, removal of the cargo and the return of the vessel to its pier, as will more fully and at large

appear from said order of December 1, 1959, on file in this Court and cause; and

It appearing to this Court from the information given to it by the United States District Attorney at Detroit, counsel for the United States Marshal, who has custody of said vessel, that an attempt was made on December 3, 1959, to carry out the terms of said order of December 1, 1959, but that the draft of the ship was greater than the depth of the water near the mill of International Milling Company at 323 East Atwater Street, Detroit, and that the ship ran aground several times in an effort to reach the milling company's pier, and that finally after hours of endeavor in this regard, the Marshal found it necessary to order the tugs which had been employed to return the ship to the pier near the American Brass Company at the foot of Clark Street, in close proximity to its place of origin; and

It appearing to this Court from the statements made by Proctors for the owner of said cargo that it remains imperative that said wheat be removed from said vessel to prevent spoilage and deterioration thereof;

NOW, THEREFORE, on motion of Miller, Canfield, Paddock and Stone, Proctors for International Milling Company and Robin Hood Flour Mills, Limited, IT IS ORDERED:

(a) That the perishable wheat, constituting the cargo of the Panamanian S.S. Theodoros A. shall be removed therefrom forthwith, and to effect such removal the United States Marshal at Detroit shall employ such tug or tugs sufficient, in his opinion, safely to move said vessel from its present pier to a dock-site in close proximity to the railroads contiguous to Detroit Harbor Terminals, Inc., 4461 West Jefferson Avenue, at foot of Clark Street, and that the unloading of such grain there take place under the supervision of said Marshal, the United States Collector of Customs at

Appendix "J"

Detroit, as may be necessary to lighten said ship to permit the subsequent moving of the vessel by tug under the Marshal's supervision to the said mill the unloading may be completed under the supervision of the United States Collector of Customs, and thereafter the ship be returned to its present pier; OR, in the alternative, if the owners of said cargo believe it more feasible to do so, then, under the supervision of said Marshal, all of the grain shall be removed from said vessel at the Detroit Harbor Terminals, Inc. (rather than simply to lighten the vessel and remove the cargo at said mill, as aforementioned), and if this alternative procedure is followed, then the unloading shall be under the supervision of the United States Collector of Customs, the vessel in the meantime to remain in the custody of the Marshal, and after completion of said unloading, the Marshal shall return the vessel to its dock.

(b) The United States Collector of Customs at Detroit shall supervise the loading of the said cargo into railway cars, under any of the aforementioned methods, for shipment to Baltimore, Maryland, to be from there transhipped, under the supervision of the Collector of Customs at Baltimore, to Melinos Nacionales, C. A. the consignee, the forfeiture provisions as set forth in Title 46, U. S. C. A., Chapter 24, Section 883, shall be and hereby are waived.

(c) That all of the terms and provisions of the order of this Court made and entered December 1, 1959, shall remain in full force and effect except only as changed and modified by this present order.

/s/ ARTHUR F. LEDERLE
Arthur F. Lederle
United States District Judge

Appendix "K"

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

IN ADMIRALTY

No. 4136

WILLIAM F. JONES, *et al.*,

vs.

FULL CARGO OF MANGANESE ORE ABOARD S.S. PACIFIC VENTURE

Order

WHEREAS, on December 16, 1959 there was deposited in Registry of this Court the sum of Twenty-three thousand seven hundred forty and 31/100 Dollars ($23,740.31) on behalf of Philipp Brothers Ore Corporation, owners of the aforesaid Full Cargo of Manganese Ore Aboard S.S. Pacific Venture, and

WHEREAS, Ramsay Scarlett & Company, Inc., steamship agents nominated by Philipp Brothers Ore Corporation, have required to be placed in funds not to exceed the sum of Two thousand Dollars ($2,000.00) prior to commencing the discharge of said cargo, said sum to reimburse Ramsay Scarlett & Company, Inc. for their expenditures in connection with the representation of the S.S. Pacific Venture in the Port of Baltimore; and

WHEREAS, pursuant to the charter party covering the voyage in question said expenditures are a charge against the freight monies due.

Appendix "K"

It is, this 17th day of December, 1959, by the United States District Court for the District of Maryland,

ORDERED that the Clerk of this Court be and he is hereby authorized and directed to pay to Ramsay Scarlett & Company, Inc. the sum of Two thousand Dollars ($2,000.00) out of the said fund in the Registry of this Court.

FURTHER ORDERED that Ramsay Scarlett & Company, Inc. account to this Court for its expenditures in connection with its representation of the S.S. Pacific Venture in the Port of Baltimore and that it refund to the Clerk of this Court any unexpended balance of said sum of Two thousand Dollars ($2,000.00).

FURTHER ORDERED that a copy of this Order be delivered to Ramsay Scarlett & Company, Inc.

/s/ ROSZEL C. THOMSEN
Chief Judge

Consented to, subject to Stipulation made in open court December 16, 1959.

/s/ SOLOMON KAPLAN
Proctor for Libellant

/s/ AARON MARGOLIS
Proctor for Intervening Libellant

No objection, subject to Stipulation made in open court December 16, 1959.

/s/ GEORGE W. P. WHIP
Proctor for Philipp Brothers Ore Corporation

TRUE COPY
TEST:

WILFRED W. BUTSCHKY
Clerk

By /s/ ARTHUR J. ROBERTSON
Chief Deputy Clerk

Appendix "L"

Decision

ADMIRALTY DIVISION

Nov. 11, 1938 LLOYD'S LIST LAW REPORTS Vol. 62.—33

Monday, Oct. 31, 1938

THE "ORION"

Before Mr. Justice LANGTON

Admiralty practice—Priorities—Standing of vessel—Discharge of cargo by cargo-owners—Vessel sold by order of Court—Claims on fund by cargo-owners and by master and crew—Order of learned Judge that claims should rank in order:-(1) Admiralty Marshal's expenses; (2) costs of arrest; (3) claims by master and crew—Whether cargo-owners entitled to include costs of discharge in costs of arrest—Preservation of fund.

—Held, that it was not shown that the discharge of cargo was essential to the safety of the vessel; further, even assuming that that discharge was work akin to salvage, that the expense thereby incurred by the cargo-owners could not be included in the denomination of costs.

This was a motion to determine the question of priorities in respect of the Polish motor schooner *Orion*, which had stranded in the River Thames in May, 1928. She was originally arrested by the cargo-owners and subsequently by the master and crew, and had been sold by order of the Court. In previous proceedings before his Lordship it was mentioned that the vessel had been sold for £411 and that the master and crew had recovered judgment in respect of wages and disbursements for £141 19s. His Lordship had accordingly entered payment out of the £141 19s., less £50 paid out on

the order of the Vacation Court. On the motion regarding priorities his Lordship had said that the order would be: Admiralty Marshal's expenses; costs of arrest; and the claim of the master and crew and costs. The cargo had been taken out by the cargo-owners and it was sought to include the costs of discharge incurred by the cargo-owners in the costs of arrest, it being alleged that the discharge was effected for the preservation of the whole fund.

Mr. O. L. Bateson (instructed by Messrs. William A. Crump & Son) appeared for the master and crew; Mr. G. H. Main Thompson (instructed by Messrs. Parker, Garrett & Co.) represented the cargo-owners.

Mr. Bateson said that the *Orion*, which had stranded in the Thames on May 10, was originally arrested by the cargo-owners in their action and was subsequently arrested by the master and crew in their action. Judgment was given for the master and crew on part of their claim, and, in dealing with priorities his Lordship had ordered: (1) The Admiralty Marshal's expenses; (2) the costs of the arrest; and (3) the wages and disbursements of the master and crew. With regard to the second item, his Lordship had added that the costs of arrest were to include the costs incurred by the cargo-owners in discharging the cargo if the discharge were done to preserve the fund. It was this to which his (Mr. Bateson's) client took objection, having submitted that the cargo-owners were not entitled as a matter of law to those costs in priority to the claim of the master and crew. Counsel read an affidavit by the master stating that after the vessel stranded, the water in the bilges was kept down without difficulty by means of the hand pumps worked by the crew. The ship had sustained only slight damage and he denied that the discharge of the cargo was ever necessary to preserve the ship.

Mr. Justice Langton: You say the cargo owners had nothing to do with the preservation of the ship?

Mr. Bateson: I do.

Appendix "L"

Mr. Justice Langton: There is no case for the cargo-owners unless they can show that what they did was for the safety of the ship. It is one thing to discharge for the benefit of having a look at the ship because you cannot see the ship thoroughly, and quite another to discharge for the safety of the ship and the safety of the general adventure.

Mr. Bateson: We say that no case whatever has been made out that anything was done to the cargo for the safety of the ship. The master was perfectly able to preserve the ship and there was never any danger to her from the position in which she lay.

Mr. Thompson, for the cargo-owners, said that there was a possibility that the ship would have sunk, and therefore it was in the interests of all parties to get the cargo out. It was irrelevant that getting the cargo out might be of incidental advantage to the cargo-owners. By removing the cargo and thus enabling the ship to be placed where she might be repaired, the cargo-owners did work which was akin to salvage. Counsel therefore asked that their expenses of unloading the cargo should be included in the costs of arrest.

JUDGMENT

Mr. Justice Langton, in giving judgment, said: The position, on examination, appears to be that it is not established at all that the ship got any benefit from the discharge of the cargo, nor is it established that the action taken by the cargo-owners was not a very wise and prudent action, taken for the most part for their own purposes. Furthermore, there is no authority at all which has been put before me to show that even if this could be, as Mr. Thompson has attempted to argue, work akin to salvage, work of that nature and expenditure upon those heads can be included in the denomination of costs. It is conceded that it is only as costs that they are asked for here by way of priority, and therefore, upon this further examination, I am driven to the conclusion that none of these expenses can be included in costs.

Appendix "M"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 A 139

MARINE TOBACCO CO., INC.,

Libelant,

against

A. H. BULL STEAMSHIP CO., A. H. BULL & COMPANY, INC., A. H. BULL & COMPANY, INC. AGENTS, and S.S. EMILIA, her tackle, apparel, furniture, engines, boilers, etc.,

Respondents.

Order

A motion having been duly brought on by Order to Show Cause for an order directing the Marshal of this Court to discharge certain merchandise from the S.S. Emilia, and directing further that the Marshal of this Court deliver such merchandise forthwith to Marine Tobacco Co., Inc., the above named Libelant, and directing that fees, if any, of the Marshal and expenses and charges necessarily incurred by him, if any, in the discharge and delivery of said merchandise to the said Libelant be borne and paid by said Libelant, and said motion having duly come on to be heard before this Court on the 7th day of May, 1963;

Now, on reading and filing the Order to Show Cause dated April 26, 1963, the affidavit of Barnie Brody, sworn to April 17, 1963, and the affidavit of Harold A. Taft, Esq., sworn to April 24, 1963, and proof of due service thereof, all in support of the said motion, and the affidavit of Arthur Abarbanel, of Counsel for Howard Schulman, Proctor for Seafarers Vacation Plan, Welfare Plan, Radio Officers Union Pension and Welfare Plan and the Radio Officers Union Vacation Plan, in opposition thereto, and due deliberation having been had thereon, it is

Appendix "M"

ORDERED, that this motion be, and the same hereby is in all respects granted; and it is further

ORDERED, that the Marshal of this Court shall forthwith discharge from the S.S. Emilia the following in bond tax-free cigarettes, to wit:

30M Lucky Strike
100M Pall Mall
10M Philip Morris Reg.
10M Marlboro Box
10M Parliament Box
40M Camel
20M Winston King
30M Salem
40M Chesterfield Reg.
20M L & M King
250 White Owl Inv.
2 Doz Edgeworth Med.
2 Doz Half & Half Med.

and it is further

ORDERED, that the Marshal of this Court forthworth deliver such merchandise to Marine Tobacco Co., Inc., the above named Libelants and it is further

ORDERED, that Marine Tobacco Co., Inc., the above named Libelant pay to the Marshal of this Court any expenses necessarily incurred by him in and about the delivery of such merchandise to the said Libelant; and it is further

ORDERED, that the Marshal of this Court be, and hereby is absolved of and from any and all liability arising out of his compliance with this order.

Dated: New York, N. Y.
May 20, 1963

FREDERICK V. P. BRYAN.
U. S. D. J.

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Supreme Court, U.S.
FILED
SEP 20 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 463

LYDON WEBBER, JOHN MARTINSON, JOHN P. MURPHY, JOSEPH O'DONNELL, JULIO F. PACHECO, J. DAMSTEDT, JOSEPH NESS-MAR, K. VLACHOS, ROBERT C. MISCIONE, SOREN LASSEN, EDWARD MARSH, RICHARD THOMPSON, GRADY WATSON, GERALD E. PETTIPAS, MARVIN PHILLIPS, JOHN BOLING, ZYGMUNT W. OSINSKI; RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, ROBERT MATTHEWS, and LINDSEY J. WILLIAMS, as Trustees of the Seafarers Welfare Plan, and RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, E. B. McAULEY and AL TANNER, as Trustees of the Seafarers Vacation Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, KENNETH J. WRIGHT, RALPH E. CASEY, WILLIAM G. MULLINS, JOSEPH S. KISS, W. H. MILLS, C. J. BRACCO and JAMES TIERNEY, as Trustees of the Radio Officers Union Pension and Welfare Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, WILLIAM G. MULLINS, JOSEPH S. KISS and W. H. MILLS, as Trustees of the Radio Officers Union Vacation Plan; ROBERT C. FRAVEL, AHMED MEHSSIN; and MAX HARRISON and PRICE C. SPIVEY, as Trustees of the Maritime Advancement Programs,

Petitioners,

against

TURNER & BLANCHARD, INC.,

Respondents,

and

S.S. EMILIA and A. H. BULL STEAMSHIP CO.

BRIEF FOR RESPONDENT TURNER & BLANCHARD, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 463

LYDON WEBBER, JOHN MARTINSON, JOHN P. MURPHY, JOSEPH O'DONNELL, JULIO F. PACHECO, J. DAMSTEDT, JOSEPH NESSMAR, K. VLACHOS, ROBERT C. MISCIONE, SOREN LASSEN, EDWARD MARSH, RICHARD THOMPSON, GRADY WATSON, GERALD E. PETTIPAS, MARVIN PHILLIPS, JOHN BOLING, ZYGMUNT W. OSINSKI; RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, ROBERT MATTHEWS, and LINDSEY J. WILLIAMS, as Trustees of the Seafarers Welfare Plan, and RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, E. B. McAULEY and AL TANNER, as Trustees of the Seafarers Vacation Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, KENNETH J. WRIGHT; RALPH E. CASEY, WILLIAM G. MULLINS, JOSEPH S. KISS, W. H. MILLS, C. J. BRACCO and JAMES TIERNEY, as Trustees of the Radio Officers Union Pension and Welfare Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, WILLIAM G. MULLINS, JOSEPH S. KISS and W. H. MILLS, as Trustees of the Radio Officers Union Vacation Plan; ROBERT C. FRAVEL, AHMED MEHSIN; and MAX HARRISON and PRICE C. SPIVEY, as Trustees of the Maritime Advancement Programs,

Petitioners,

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S.S. EMILIA and A. H. BULL STEAMSHIP CO.

BRIEF FOR RESPONDENT TURNER & BLANCHARD, INC.

Question Presented

Is the cost of discharging the cargo of an attached vessel a marshal's expense?

Statement

The *Emilia* was arrested in mid-December, 1962 while she was berthed at Pier 21, Brooklyn, in a terminal operated by Turner & Blanchard, Inc. On March 20, 1963, about three months after her arrest, three owners of more than 60% of the cargo on board filed libels to repossess their cargo. They then joined in a motion in the District Court for summary relief, directing the Marshal, at his own expense, to discharge their cargo and deliver it to each of them free of cost. Turner & Blanchard, Inc. did not oppose removal of cargo by the owners but through affidavit of its President opposed any order which would have made the cost of discharging the cargo a Marshal's expense.

The United States of America, as one of the intervening libelants, appeared by its local attorney in charge of the Admiralty & Shipping Section of the Department of Justice and submitted an affidavit in support of the motion, relating that a quantity of government cargo consisting of chill and freezer cargo, known in the trade as reefer cargo, was on board and if not removed could become a total loss, but that to preserve it maintenance men had been retained and "this cost money"; that other government cargo on board, identified as some 2500 bags of wheat, if confined in the hold of the vessel for any protracted period of time might also deteriorate.

The second intervening libelant, Caltex (India) Limited explained by affidavit that it had 1070 tons of tinplate which had been stowed in the lower holds of the vessel, while the third intervening libelant, the Government of Pakistan averred that it had eight locomotives on deck and other cargo below having an approximate value of 2½ million dollars.

Their motion came on to be heard before Judge George Rosling who reserved decision. After he announced that,

he was not prepared to rule upon the motion until a later date, the United States Government insisted on judicial permission to remove its cargo. Permission was granted but the Government for some undisclosed reason, changed its plan and refused to do so.

The cargo interests then decided to play a waiting game. They took no further steps to reclaim their cargo until after a motion was made before Judge Mishler on behalf of Turner & Blanchard, Inc. on April 26, 1963, for an order directing the removal of the *Emilia* from Pier 21 where she was then berthed, or that she be sold, because (a) wharfage which has priority as an administrative expense was eating up any proceeds that might be realized from the sale of the vessel, and (b) because Turner & Blanchard, Inc. was suffering irreparable financial damage in loss of stevedoring business from the presence of the *Emilia* fully loaded at Pier 21 (3a, 8a).*

ARGUMENT

POINT I

The decision below was based on *New York Dock Co. v. S.S. Poznan*, 274 U. S. 117, but this reliance was misplaced because the order under review is not supported by *Poznan*, in which this Court never reached the question now presented.

The parties in this case agree that the cost of preserving the ship in *custodia legis* is preferred over maritime liens, but they are not in accord over the rule of law established below that cargo owners may have their cargo removed as a cost of preserving the ship.

The cargo interests saw in the motion before Judge Mishler an opportunity to achieve by indirection the same

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* Unless otherwise explained numerals in parentheses refer to the pages of the appendix to the petition for certiorari.

relief which they had sought but not attained by direct application to Judge Rosling. After Judge Mishler indicated that he would go along with the cargo owners' claim that the cargo should be removed at the cost of the vessel, the cargo owners withdrew their earlier motion before Judge Rosling.

Before Judge Mishler all three possessory libelants claimed that they could not remove their cargo except as part of a complete discharge operation. Imaginary, speculative difficulties were projected over the problems attending the removal of the cargo, none of which were supported by any evidence; none of which would have been of any significance if an order had been entered either directing the owners to remove cargo or deeming it abandoned and sold or removed at the expense of reluctant cargo owners.

On the question submitted by the petitioner for certiorari, the United States of America is in no better position than other civil litigant contract claimant in an Admiralty suit. So far by its presence in this case, pushing the contention that its cargo aboard might deteriorate, simultaneously refusing to take it off except on its own terms, it has imparted to the cause a sense of urgency and special need which although no more than a ghost issue has nevertheless been very impressive to the District Judge and the Court of Appeals, both of whom expressed concern over what would happen to the wheat on board if it were not promptly removed. The Government of Pakistan and Caltex simply rode along on the Government's coat-tails.

The Record on Appeal in *Poznan* discloses that the case was considered by this Court on an agreed statement of facts. The claims

> ". . . consisted of . . . suits for nondelivery of cargo shipped from New York and carried by the ship to Havana and back to New York without being discharged until the ship returned and unloaded the cargo in New York. This action was against the ship in rem

and against the Acme Operating Corporation, charterer of the ship, and the Polish-American Navigation Corporation, the owner of the ship in personam and an interlocutory decree entered against all three. The ship has now been sold and there is now about two hundred and forty odd thousand dollars left in the Registry of the Court, being the proceeds of the sale. The libels in the consolidated cause claim damage in the amount of about $1,700,000. and their actual provable damage will exceed the amount of money left in the Registry of the Court." (Stipulation, *Poznan*, R. 10)

On November 30, 1920 the New York Dock Co., as owner of a pier on the Brooklyn shore of the East River, made a contract with a navigation company owning the *S.S. Poznan* for the use of the pier by their vessel at a stipulated rate (R. 8-9).*. On December 2, 1920 the *Poznan* arrived and was made fast to the pier. Thereafter, at the instance of certain libelants, whose libels were for the recovery of the vessel's cargo and for damages for breach of contracts of affreightment, the vessel was arrested by the Marshall who allowed her to remain fast to the pier (R. 9).

Later the District Court ordered delivery of a certain part of the cargo to one libelant and made the same order applicable to all libelants claiming parts of the cargo (R. 9, 14).

Before the cargo was fully discharged on the pier, the charterer of the vessel applied to the District Court for leave to have the vessel moved to another pier. This motion was opposed and denied (R. 30). The cargo was then completely discharged from the vessel by February 18, 1921. Delivery of the cargo from the pier was completed

* Numerals preceded by "R" refer to the Record on appeal in *Poznan*.

March 1, 1921, but the vessel remained fast to the pier until and including March 11, 1921 when it was moved to another pier (R. 9). The Marshal refused to pay the Dock company's bill for wharfage without an order of the Court (R. 11-13) and the Dock company on April 9, 1921 filed its libel (R. 1, 3).

Essentially, the foregoing facts as stipulated, were found by a Special Commissioner whose findings were confirmed by the District Court and accepted by the Circuit Court of Appeals. These findings presented for consideration by this Court only the question of law whether wharfage was a marshal's cost which could be recovered by the wharfinger regardless of whether a lien could be filed against a vessel in *custodia legis*.

POINT II

The opinions below have destroyed traditional priorities by improperly engrafting on *Poznan* a principle which that case did not establish.

In *Poznan*, this Court wrote that:

> "Service rendered to the ship after arrest, in aid of the discharge of cargo, and afterward pending the sale, necessarily inured to their benefit, [that is to the cargo owner's benefit for they were the only libelants in the case] for it contributed to the creation of the fund now available to them. The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the court, should be paid from the fund as an 'expense of justice'. The Phebe, Ware, 354, 359, Fed. Cas. No. 11,065."

By these words this Court established two copulative requirements: (1) "Service rendered to the ship after arrest, in aid of discharge of cargo, and afterward pending the sale", (2) "for the common benefit of those interested in a fund administered by the court".

As To (1)

Before a cargo owner can remove cargo the ship has to be in a place where it can be discharged. If she is lodged at a dock while in *custodia legis* then the cargo can be removed. In *Poznan* this Court in using the words "in aid of the discharge of cargo" was merely referring to a circumstance. There was no claim there that the cargo should be discharged as a Marshal's expense; no issue and no decision on that point. Indeed each of the cargo owners had already removed his cargo at his own expense. Hence the order under review which is purportedly based on *Poznan* engrafts on this Court's decision a new principle which was not part of the subject of that case.

As To (2)

Generally speaking, a ship owner's failure to discharge cargo amounts to a breach of contract with cargo owners for which they have a claim which falls into Class IV in the scheme of priorities, but by their maneuvers the cargo interests have so far succeeded in elevating themselves to top priority, even above the claim for wharfage, which everyone concedes to be a Marshal's expense. By obtaining an order directing that the discharging expenses be paid first, the United States Government has destroyed traditional priorities in this area of the law and has even established a new system of priority among items, all of which are concededly in the class of Marshal's expenses.

By deliberately refusing to repossess their cargo, until they could do so on their own terms, the owners have done nothing in aid of the vessel or for the common benefit of the lienors. To the contrary, their actions were definitely detrimental to the common interests of the lienors because if they had removed the cargo in which they alone had interests, as they should have, charges for wharfage and other expenses of sale would have been kept at a minimum, and the vessel might well have brought a higher price in a sale before it earned a reputation as one in distress; in dire need of a purchaser to bail out the cargo interests.

Instead of directing the cargo interests to remove their cargo as he should have, the District Judge protected the cargo interests at the expense of the prior lienors and not in their aid. His order was made *ad hoc*. It represents a departure from settled principles and from a system of established priorities on which people have relied. Definite rules of priority are essential so that parties may at least know their rights in advance of decision. Existing laws providing for such rights have been ignored, and unless the order is reviewed here, the practice which it purports to authorize will make a shambles of the law of priorities and work an injustice to the preferred lienors in this case.

CONCLUSION

Certiorari should be granted so that the orders below may be modified to the extent indicated by the petition.

Respectfully submitted,

JULIUS L. GOLDSTEIN,
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Certification of Service.

This is to certify that on the 19th day of September, 1963 I served true and correct copies of the foregoing brief by first class mail upon counsel for the respective parties hereto, as follows:

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 463

LYDON WEBBER, ET AL., PETITIONERS

v.

TURNER & BLANCHARD, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE UNITED STATES MARSHAL IN OPPOSITION [1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 1963 AMC 1447, but has not yet been reported in the federal reporter.[2] The memorandum decision of the district court (Pet. App. 21a-22a) is reported at 1963 AMC 1448.

[1] The United States is a party to this litigation in its capacity as a cargo owner. The United States Marshal, although not a party in the court of appeals, incurred substantial liabilities pursuant to the mandate of the court of appeals and district court orders, and would therefore be adversely affected by the grant of certiorari. See, *infra*, pp. 5–6.

[2] "Pet. App." refers to petitioner's appendix, which is attached to the petition for a writ of certiorari.

JURISDICTION

The judgment of the court of appeals, affirming the order of the district court, was entered on June 28, 1963. The petition for a writ of certiorari was filed on September 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court exceeded its discretion in holding that the cost of discharging cargo from an attached vessel to facilitate its sale was a marshal's administrative expense.

STATEMENT

On December, 1962 (Pet. 4), while carrying some $3,000,000 worth of cargo owned by more than 200 different consignees, the SS EMILIA was seized and taken into the custody of the district court pursuant to a libel for personal injury. Soon thereafter approximately 30 other libels were filed. Petitioners' libels, which were filed on February 26, 1963,[3] sought wages, contributions to union vacation and welfare funds, and maintenance and cure. With one exception, the wage claims derive from December 14, 1962, until the crew was discharged in March 1963, that is, the period of time in which the vessel was in the custody of the court and petitioners were engaged as its seamen.[4]

[3] Petitioners filed three libels on February 26, 1963, one for wages and two seeking approximately $15,300 in employee contributions to union funds. Two additional libels by "trustees" seeking approximately $4,500 for maintenance and cure, were filed on May 17 and May 20, 1963.

[4] Although the amended libel of petitioners Webber *et al.* seeks approximately $66,000, their wage claims, excluding asserted penalties and fringe benefits, do not exceed $10,000 to

Only one of the petitioners made an express claim for unpaid wages accruing prior to the arrest of the vessel.[5]

On February 28, 1963, Turner & Blanchard, Inc., the dock-owner, filed a libel in the United States District Court for the Eastern District of New York for wharfage and other services rendered the EMILIA while in *custodia legis*. On or about April 24, 1963 (Pet. 6), Turner & Blanchard, Inc., petitioned the court for an order removing the EMILIA from its dock, where she blocked nearly one-third of its facilities, or authorizing her judicial sale (Pet. App. 3a).[6] After a hearing, on May 13, 1963, the court authorized sale of the vessel (Pet. 7). On the initiative of proctors for the first preferred mortgagee, the court held further hearings May 20–21[7] to dis-

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$12,000. The payroll records of the vessel's owner reveal that all of the petitioners have in fact received all of the claimed wages, from proceeds of a bank letter of credit to A. H. Bull, for the period of time in which the vessel was in the custody of the court.

[5] Examination of the payroll records of A. H. Bull, the vessel's owner, discloses that the petitioners, and all other seamen of the EMILIA, were paid in full to and including December 11, 1962, the day preceding the arrest of the vessel (with the possible exception of petitioner Fravel, who has a claim for wages accrued prior to November 28 in the amount of $149.66).

[6] Judge Mishler, rather than Judge Rosling, was hearing motions at this time.

[7] In the notification of interested parties to appear May 20, 1963, the proctor for petitioners Webber, *et al.*, was inadvertently omitted. He appeared, however, at the May 21, 1963, hearing (Pet. 8–9).

cuss such matters as the impracticality of continuing the effort to sell the vessel with cargo aboard, the possibility of obtaining stevedores to discharge the cargo, whether the expense of unloading should be considered a marshal's administrative expense, and the minimum upset price at the marshal's sale. By order of May 21, 1963 (Pet. App. 14a), the court authorized sale of the vessel, free of cargo, at a minimum price of $250,000. Finding that the presence of the cargo had an adverse effect on the sale of the vessel, "to the detriment of all parties who have an interest, claim or lien in the vessel," the court ruled that the costs of discharging the cargo should be paid out of the proceeds of the sale as a marshal's expense (Pet. App. 21a–22a).

Subsequently, the EMILIA's owner, the A. H. Bull Company, and other corporations controlled by Manuel Kulukundis filed petitions in bankruptcy under Chapter X of the Bankruptcy Act, which are currently pending in the United States District Court for the Southern District of New York (Pet. 9). After extended argument, Judge Croake excluded the EMILIA from a stay of sale of Kulukundis vessels. On June 4, 1963, the EMILIA, with cargo aboard, was offered for sale at public auction, title to pass after removal of the cargo. No bids were received (Pet. 10, 11).

Also on June 4, 1963, petitioners and others appealed from the portion of the court's order authorizing payment of cargo removal costs from the proceeds of the sale (Pet. 11). On June 28, 1963, the United

States Court of Appeals for the Second Circuit affirmed the order *per curiam* (Pet. App. 1a) on authority of *New York Dock Co.* v. *SS Poznan*, 274 U.S. 117, and directed the district court to proceed with all reasonable dispatch. Petitioners neither petitioned for a stay or recall of the mandate, nor manifested any intention of seeking certiorari. On July 3, 1963, the district court, on notice to all parties, including petitioners, and without objection from any of them, entered an order authorizing and directing the marshal to "effect the discharge of the said cargo" and that the "cost of unloading the cargo shall be a Marshal's expense of the sale of said vessel to be paid out of the proceeds of the sale of the vessel." As instructed, the marshal entered into an agreement with the low bidder, International Terminal Operator Company, and the cargo was unloaded. On July 30, 1963 (Pet. 11), the vessel was sold to the sole bidder for $250,000, and on August 1, 1963 (Pet. 12), the district court confirmed the sale.

On August 2, 1963, the United States Marshal moved for an order directing the court to turn over to him, from the proceeds of the EMILIA, the sum of $192,176.62 to pay all[*] of his administrative ex-

[*] The wharfinger, Turner & Blanchard, has claimed $105,723.39 (Pet. 15) for wharfage, which, as a marshal's administrative expense, would also have priority over the claims of the maritime lienors. *New York Dock Co.* v. *SS Poznan*, 274 U.S. 117. That claim appears to be excessive; a reasonable wharfage fee should not exceed $40,000. Accordingly, since the fund consists of $250,000, it is entirely possible that the petitioners' priority claims will be paid regardless of this Court's action in the matter. In any event, there appear to be insufficient funds to pay the unions' other

penses, including an expense of $181,000 incurred in removing the cargo (Pet. App. 17a).[9] At the hearing on this motion on August 7, 1963, petitioners for the first time indicated their intention to seek certiorari from the Second Circuit's decision of June 28, 1963, affirming the district court's order of May 21, 1963. On August 7, 1963, the district court granted the motion to turn the proceeds over to the marshal, but stayed the order for two days in order to permit petitioners to ask the Second Circuit for a further stay. That same day, petitioners moved the court of appeals for a stay of the district court's order and for a recall and stay of the court of appeals mandate of June 28, 1963. On August 8, 1963, the Second Circuit denied the motion, but gave petitioners until August 14, 1963, to obtain a stay from this Court. On August 23, 1963, Mr. Justice Harlan granted a stay pending the filing of a petition for certiorari on or before September 12, 1963.

ARGUMENT

1. This case involves nothing more than the application of a settled principle to the particular circumstances disclosed by the record. In *New York*

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claims (which do not constitute liens), regardless of this Court's decision. In the same situation are the claims of the intervening petitioner, Maritime Food Corporation, whose libel for supplies furnished pursuant to 46 U.S.C. 971 *et seq.* falls in the Court's recognized Maritime lien category (Pet. 30-31).

[9] Rule 26(b) of the Admiralty Rules for the United States District Courts for the Southern and Eastern Districts of New York.

Dock Company v. *SS Poznan*, 274 U.S. 117, the Court laid down the rule that expenditures which inure to the benefit of the lienors of an attached vessel by helping create or preserve the fund available for distribution should be treated as an expense of administration and charged against the proceeds of the sale of the vessel before satisfaction of the libellant's claims. In *The Poznan*, certain wharfage costs were thus given priority as an "expense of justice." Similarly, in the instant case, the district court found that "the presence of cargo aboard has an adverse effect on the sale to the detriment of all parties who have an interest, claim or lien in the vessel," and, applying the rule of *The Poznan*, held that the costs of discharging the EMILIA should be treated as a marshal's expense (Pet. App. 2a, 21a–22a). Petitioners do not challenge the principle applied by the courts below[1] but contend merely

[1] Application of the *Poznan* principle to outlays benefiting an attached vessel has not been challenged in this Court since that decision in 1927. It has been followed by many lower courts in allowing wharfage as an administrative expense. *E.g.*, *Moore* v. *United States*, 302 F. 2d 918 (C.A.D.C.); *Moon Engineering Company, Inc.* v. *The S.S. Valiant Power*, 193 F. Supp. 460 (E.D. Va.); *Murray* v. *The Meteor*, 83 F. Supp. 212 (E.D.N.Y.); *The Herbert L. Rawding*, 55 F. Supp. 156 (E.D. S. Car.). The *Poznan* principle has also justified preferential payment of claims for wages of seamen requested by the marshal to stay aboard an attached vessel, *The Pacific Hemlock* v. *Hemlock SS. Corp.*, 3 F. Supp. 305 (W.D. Wash.); for loans made to continue the operation of an attached vessel, *United States* v. *The Audrey II*, 185 F. Supp. 777 (N.D. Cal.); and cf. for insurance covering an attached vessel, *The Herbert L. Rawding*, 55 F. Supp. 165, 166 (E.D. S. Car.).

that the costs of unloading did not in fact inure to the common benefit of all the lienors (Pet. 18–20). That purely factual question is plainly unworthy of certiorari.[11]

Moreover, the record amply supports the disputed finding. Some 8,500 tons of cargo owned by more than 200 consignees never left the port of embarkation. A substantial part of the cargo, which was placed on board the EMILIA more than five months before the vessel was offered for sale, consisted of perishable items.[12] To remove individual portions on a piecemeal basis was impractical for it would have entailed extensive unloading and shoring up of surrounding cargo, with an appreciable risk of damage. Prospective purchasers of the vessel were presumably unwilling to deliver the cargo because of the high probability that much of it had either deteriorated or been replaced by the shippers in the interim. Nor would they have been prepared to take responsibility for unloading the cargo; for even had it been clear, as it was not, that the costs of unloading could have been recovered from the cargo owners, potential purchasers were understandably reluctant to buy more

[11] This Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; see, *e.g.*, *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147; *The Germanic*, 196 U.S. 589.

[12] The cargo included 2,650 tons of bagged wheat, most of which was close to the point of spoilage at the time the cargo was discharged. It also included frozen and chilled foodstuffs, much of which had spoiled.

than 200 lawsuits along with the vessel. In these circumstances the court properly found that the cargo was an impediment to the sale of the vessel (Pet. App. 21a). The accuracy of that finding was confirmed by later events. For, whereas there were no bidders when the EMILIA, with the cargo aboard, was offered for sale on June 4 at a minimum price of $250,000, the same offer was quickly accepted a few weeks later after the cargo had been removed (Pet. 11–12).

The courts below did not, as petitioners imply (Pet. 30), lay down a general rule that the costs of unloading a vessel after arrest are always or even usually a marshal's expense. They held merely that since, in the special circumstances of this case, the discharge of the cargo removed an important obstacle to the sale of the vessel (Pet. App. 20a, 21a), the costs of unloading should be borne by all of the lienors. Such a decision manifestly does not have the far-reaching importance claimed for it by petitioners.

2. Petitioners concede that the decision below is not in conflict with that of any other court of appeals, but predict that such a conflict will arise in the future (Pet. 34–35). The short answer, of course, is that the conflict can be resolved if and when it arises. Moreover, four unreported orders (Pet. 23a–36a, 40a–41a) placing the costs of discharging a libeled vessel upon cargo owners in the particular circumstances do not constitute a "long-established' maritime

custom, as petitioners maintain.[13] The only reported decision they cite is *The St. Paul*, 271 Fed. 265 (C.A. 2), a pre-*Poznan* decision of the Second Circuit in which the costs of discharging cargo were not in issue. Thus, there is no basis for petitioners' prediction of an impending conflict.

Petitioners also anticipate the disruption of the established system of priority for payment of maritime liens from an inadequate fund. The thrust of this Court's decision in *Poznan*, however, is that expenditures sanctioned by the court for the benefit of a vessel in *custodia legis* are not considered maritime liens which must compete with other liens for payment. Rather, their priority of payment is founded upon general equitable doctrines concerning the preservation of a *res* by the court.

3. An additional consideration militates against the grant of certiorari. In contracting for the services of a stevedore to unload the ship, the marshal was merely carrying out the July 3 order of the district court, which directed him to "effect the discharge of the said cargo as soon as practicable." That order, in turn, gave effect to the urgent mandate of the court of appeals issued June 28, which commanded the district court to "proceed with all reason-

[13] Nor does *The Orion* (Pet. App. 37a–39a) establish any such hallowed practice in English Admiralty Law. Cargo owners there contended, *but could not establish*, that removal of cargo from a stranded vessel contributed to its salvage, thereby becoming an expense of arrest.

able and feasible dispatch" (Pet. 2a). Petitioners stood by silently and permitted the marshal to incur these liabilities, to unload the EMILIA, and to sell the vessel. They made no attempt to stay or recall the mandate of either court at the time it issued. It was not until the proceeds of the sale were safely in the registry of the court that petitioners for the first time disclosed their purpose to seek certiorari; only then did they move for a stay of the district court's order—not to prevent the marshal from making the expenditure, but to prevent his reimbursement from the fund held by the court. Petitioners maintain that they derived no benefit from the discharge of the cargo. If that be true, it was all the more incumbent upon them, as a matter of equity, to obtain a postponement of the unloading, or at least to reveal their intention to seek review, so that the marshal might have been spared the risk of having to pursue more than 200 cargo owners—most of them not amenable to suit in this country—in order to make himself whole. Having failed to take such action, petitioner should not be heard at this late date to deny that the expenses incurred by the marshal were "marshal's expenses."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 463

LYDON WEBBER, JOHN MARTINSON, JOHN P. MURPHY, JOSEPH O'DONNELL, JULIO F. PACHECO, J. DAMSTEDT, JOSEPH NESSMAR, K. VALCHOS, ROBERT C. MISCIONE, SOREN LASSEN, EDWARD MARSH, RICHARD THOMPSON, GRADY WATSON, GERALD E. PETTIPAS, MARVIN PHILLIPS, JOHN BOLING, ZYGMUNT W. OSINSKI, RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, ROBERT MATTHEWS, and LINDSEY J. WILLIAMS, as Trustees of the Seafarers Welfare Plan, and RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, E. B. McAULEY and AL TANNER, as Trustees of the Seafarers Vacation Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, KENNETH J. WRIGHT, RALPH E. CASEY, WILLIAM G. MULLINS, JOSEPH S. KISS, W. H. MILLS, C. J. BRACCO and JAMES TIERNEY, as Trustees of the Radio Officers Union Pension and Welfare Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, WILLIAM G. MULLINS, JOSEPH S. KISS and W. H. MILLS, as Trustees of the Radio Officers Union Vacation Plan; ROBERT C. FRAVEL, AHMED MEHSSIN; and MAX HARRISON and PRICE C. SPIVEY, as Trustees of the Maritime Advancement Programs,

Petitioners,

and

MARITIME FOOD CORPORATION,

Petitioner,

against

TURNER & BLANCHARD, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENT, GOVERNMENT OF PAKISTAN, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Petitioners,

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MARITIME FOOD CORPORATION,

Petitioner,

against

TURNER & BLANCHARD, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENT, GOVERNMENT OF PAKISTAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Question Presented.

Where a district court found that the discharge of cargo from an attached vessel was an essential preliminary to the sale of such vessel by the marshal and ordered him to con-

tract for such discharge as an adminstrative expense to be repaid out of the proceeds of sale of the vessel prior to the distribution of the balance of such proceeds among attaching lienors, was such order, in the circumstances, an abuse of discretion?

Statement.

The cargo loaded by the SS. *Emilia*, as a common carrier in international trade, included property of this respondent and well over 200 other shipments deliverable at the Azores, Izmir, Iskanderun, Beyreuth, Port Said, Port Sudan, Massawa, Karachi and Bombay.

The subsequent facts are as set forth in the brief submitted in behalf of the United States and the United States Marshal. Except as so stated, this respondent rejects the statement of facts given in the brief of Petitioners Webber, *et al.* In a case that turns on facts and on equitable principles, some specific corrections seem to be in order.

A. Petitioners Webber, *et al.*, do not advise the court of their true interest, or lack of it, in the subject matter. There are nineteen petitioning seamen, of whom 17 were libellants for unpaid wages and two for maintenance and cure. Respondent's proctor has just learned that the records of the owners, A. H. Bull S. S. Co., bolstered by signed receipts, show that the wages of all of these men *have been paid in full*, with the possible exception of one, John Boling, a radio operator. The records show payment to Boling of the $763.22 balance which was due him, but his receipt was not produced. It also appears that while the seamen's wages accruing prior to the seizure of the vessel were paid directly by the owners, those rendered thereafter were paid indirectly out of owners' funds. Prior thereto the owners had established a bank letter of credit to assure payment of

wages, by request of the Seafarers' International Union, which feared a collapse of the Bull Lines and other Kulukundis companies. Final payment of wages was accomplished through a union drawing on said bank credit. It further appears that Boling, without the marshal's agreement was held by the owners on stand-by hire while the vessel was *in custodia legis* and thus had no liens for said balance in any event.

Of the two remaining seamen, petitioner Ahmed Mehsin, appears to have worked January 10-31, 1963, while the vessel was in custody, and has a non-lien claim for $500 for maintenance and cure. Petitioner Richard C. Fravel claims $336 for maintenance and cure, $149.76 for unearned wages and $16.61 for transportation which, on proof, would constitute liens.

The remainder of these petitioners claim as trustees of union funds, which would make them general creditors not possessing liens against the vessel. *Brandon* v. *SS. Denton*, 1962, C. A. (5th), 302 F. (2d) 404.

2. To complete the factual picture with respect to seamen, or persons who may be seamen, but are not petitioners herein, the records indicate that eight personal injury libels were filed, of which four are covered by, and defended by, insurers. The remaining four suits, defended by the owners, were appraised for reserve purposes at a total of $12,000, assuming that all four prove negligence and sustain their causes of action.

3. Petitioners Webber, *et al.*, in their statement and argument, aver that the amount *claimed* by Turner & Blanchard, Inc. for wharfage would exhaust the fund (Pet.

15, 27), without noting that such wharfage was not contracted for by the marshal with or without court sanction, and is subject to proof of reasonable value. For example, comparable published rates at Port of New York Authority piers in the same area (P. N. Y. A. Schedule No. 7) are $75 *per diem* for an inactive vessel such as the *Emilia*. Any reasonable award to Turner, even at double those rates, would be paid in full, leaving an ample residue for unpaid seamen, if any, as well as the maintenance and personal injury cases not otherwise disposed of. Incidentally, under Rule 26 of the District Court for the Eastern District of New York, wharfage claims are not includible in the Marshal's bill of costs where the amount still has to be established, but are handled by a separate procedure, whereas the discharging stevedore's claim was fixed in amount by contract sanctioned by the court after competitive bidding.

4. Petitioners; Webber, *et al.*, do not fully advise the Court on the subject of delay. The paramount union objective was reorganization of the Kulukundis companies, an understandable objective in that various union funds were the largest unsecured creditors of such companies and that union jobs could be preserved by reactivating the vessels. In pursuit of that objective said petitioners' position was to oppose removal of outbound cargo and sales of vessels. It may be noted that as late as May 20, when Marine Tobacco Co. Inc. obtained an order (Pet. App. 40a, 41a) for removal of its merchandise from the *Emilia* at its own expense, involving the work of one man with a waiting truck, the order was granted over the opposition of said petitioners, who wanted to preserve the *status quo*.

5. Said petitioners' statement that Judge Thomas F. Croake enjoined the sale of the S.S. *Emilia* (Pet., 9, 10) is

inaccurate. It is true that he took the matter under advisement as requested by the owners and the unions, and conferred with Judge Mishler, but he excluded from his general injunction the SS. *Emilia*, sale of which was simultaneously postponed to June 4, 1963 by Judge Mishler to afford to petitioners and owners the further time and opportunities they were seeking.

6. The hearings before Judge Rosling (Pet. 5-7), which were conducted in the framework of the mortgagee's foreclosure proceeding, were never completed, but adjourned *sine die* and aborted through the failure of any party to ask for their reconvention. In the course thereof, Judge Rosling remarked from the bench that a cargo-owner had a legal right to re-claim his cargo despite the pleas of the owners, supported by the petitioners and others, that the Court should preserve the *status quo* pending possible reorganization of the company. These proceedings, however, became moot and are irrelevant.

7. The United States, Government of Pakistan and Caltex (India) Ltd. did not own a "substantial majority" of the cargo as petitioners Webber, *et al.*, assume (Pet. 4), but about 3,500 tons out of 8,800. However, petitioners' error may arise from the fact that the Department of Agriculture had a regulatory duty to inspect about 2,800 tons of wheat owned by others for deterioration due to delay and such wheat was sometimes erroneously referred to as United States cargo.

8. None of said three cargo-owners could get at and remove his cargo, all or part of which was buried in the ship, for a multitude of practical reasons, and it is unfair and misleading to imply that in this case there could have

been anything other than a total discharge of cargo in one operation.

9. In their respective statements neither petitioners nor respondent Turner & Blanchard, Inc. attempt to assert as a fact that the district court or the marshal could have found stevedores and other personnel willing to remove the cargo and look thereto for payment of their charges. Yet, in their arguments, both assume this to be a fact (Pet. 28; Turner, 4), which is unwarranted in the case at bar, whatever may have been the circumstances in another and different case. Here there is no showing of any such offer by Turner & Blanchard, Inc., which is in the stevedoring business, nor by any of its fellow stevedores, nor is there any showing that union labor to man the vessel during her removal and discharge would work on any such speculation. The problem of finding money to preserve, discharge and sell the *Emilia* is ignored, except for the glib assumption in argument that the court did, after all, have some realistic alternative. In actuality, no way of raising funds for any such purpose, even to pump the bilges, was ever found except by assurance of payment out of the vessel's sale proceeds.

ARGUMENT.

I.

The principles of law applicable to this case have already been promulgated by this court and no conflicts exist. The challenge is to a factual matter involved in the exercise of the district court's discretion, which proposed exercise of discretion was reviewed and affirmed by the Court of Appeals for the Second Circuit before it was carried out. It is apparent that factual situations of general similarity seldom arise, that the specific facts in each such case are apt to be unique and that the facts before us are unique. No general significance can be attached to a review of this case.

When lienors attach a vessel, demanding its sale, it is the first duty of the court to achieve such sale. The court has all the necessary discretion to authorize and direct the marshal to incur such expenses as it may find necessary in a particular case to accomplish the sale. The expenses so authorized are to be paid first out of the sale proceeds. The balance, if any, is to be distributed to the attaching lienors in accordance with the rank and priority of their liens. These principles are settled. *New York Dock Company* v. *SS. Poznan*, 274 U. S. 117.

In the circumstances of our case, where it was found that the vessel could not be sold without prior discharge of cargo in one operation at the expense of the fund to be generated by the sale, the district court's discretion was so exercised. Significantly, the petitioners confined their appeal to the Court of Appeals from the district court order of May 21, 1963 (Pet. App., 14a; 15a) solely to that portion which decreed that the cost of unloading the vessel should be a marshal's expense to be paid out of the proceeds of

sale. They did not appeal from, and thus recognized the necessity of, provisions that the vessel be sold free of cargo at an upset price, that the marshal contract for the moving, unloading, etc., and that the costs of moving the vessel, insurance and wharfage charges to the date of delivery to a purchaser should be marshal's expenses (Pet. 4).

As for Turner & Blanchard, Inc., the wharfinger who has filed a brief supporting the plea for certiorari, it did not appeal from said district court order at all. It joined in the motion of cargo respondents for an early hearing of said appeal on numerous emergency grounds, although it now, in argument, purports to deprecate the emergency (Turner, 4).

The Court of Appeals, in due course, affirmed the district court's application of the same principle to the expense of physically unloading the cargo as was applied to the accessory expenses incidental to the unloading. Petitioners are unable to cite a single holding that a distinction must be made and a different principle applied. In the absence thereof, they append a few consent orders of district courts wherein discharge costs were met by cargo owners. Voluntary actions induced by economic considerations outside the field of law underlie such consent orders.

In *The St. Paul*, 271 F. 265 (1921, 2nd C. C. A.), the sole reported case relied on by the petitioners, cargo discharge had likewise been dealt with by consent order and was never an issue. While the vessel was in custody of the marshal, she underwent fire, sinking and raising at her anchorage, with the cargo already injured and liable to further depreciation. Into this emergency situation stepped one Hudson Navigation Company, which offered to take the vessel to its pier and discharge her and look to the cargo-owners for payment of the cost of discharge. The district court granted a consent order authorizing the

marshal to permit this to be done. Hudson also attempted to acquire the vessel at a sale which was held while its delayed unloading was still in progress, on a bid so low that the district court refused confirmation of the sale and was upheld therein by the Court of Appeals. Obviously, Hudson had interests and motivations beyond those of a stevedore. After discharge of cargo the vessel brought a fair price on a resale. *The St. Paul* was brought to the attention of the Court of Appeals for the same circuit on the appeal in the case at bar.

Petitioners also cite and append the opinion in *The Orion* (Pet. App. 37a-39a) an English case entirely distinguishable on its facts. Cargo-owners entered a salvage claim for the cost of their voluntary discharge of cargo from a vessel which had stranded in the Thames. The Court found that there was no danger to the vessel by retention of the cargo nor any benefit to the ship from its discharge.

It is painfully obvious that petitioners' point that the lower courts' determination would overturn established law is without substance or foundation.

II.

Petitioners profess to find in *Poznan* a "test" concerning "benefit of the lienors" which would violate common sense as well as the court's own language, the clear meaning of which is benefit to the *res* in the liquidation thereof to create a fund.

Petitioners profess the "test" to be "whether the act would benefit all of the claimants interested in the fund created from the sale of the vessel, in order to hold the cost of discharging the cargo as an administrative expense" (Pet. 18). This would recognize that the cost of discharge

was, like the wharfage, an administrative expense in the *Poznan* context, but would assert that it can never be such in a case where there are lienors other than cargo-owners, or where all claimants cannot be paid in full.

Let us first examine this "test" from a common sense viewpoint. Being a "test", and therefore immutable, it would rule out any case in which there were one other lienor, such as a seaman, among the cargo-owners, regardless of whether or not the seaman would be paid. Were the lienors a mixed group, some of whom would be paid and some not paid, the court would be helpless to get the cargo discharged by promising payment therefor out of the sale proceeds, regardless of the many hypothetical situations in which there would be no other way out. The powers of the court would be limited firstly by the condition and market value of the vessel it received for liquidation and, were it a hulk, the court would seem to have no recourse but to refuse to accept the case. The court's powers would be limited, secondly, by the nature and amount of the liens, so that proofs of claims could not, as now, await the creation of a fund, for there might be a species of libellant who did not have a lien or who was paid off subsequent to filing his libel.

One must then inquire whether this "test" is met if all libellants are cargo-owners but some have priority over others because they have tort claims (cf. *The Henry W. Breyer*, D. C. Md. 1927, 17 F. 2d 423; *The City of Athens*, D. C. Md. 1949, 83 F. Supp. 67) and thus some do not get to participate in the fund. If all libellants are cargo-owners and the sale yields no residual fund after administrative expenses, would the "test" be met because the cargo-owners receive collateral "benefit" from having their cargo discharged? Some may not, where cargo has spoiled or has lost its market and is not worth reshipment or handling charges.

More importantly, however, if *Poznan* turns on collateral benefit to cargo owners, why did not the court just say so and let the case rest on implied contract or unjust enrichment? Instead, the Court clearly explained its own rationale. It took the view that the case was one of liquidation of a *res*, presenting similar problems in an admiralty court or any equity court, and it proceeded to review the governing principles. As for administrative expenses (274 U. S. 117, 121):

> "* * * They result rather from the self-imposed duty of the court, in the exercise of its accustomed jurisdiction, to require that expenses which have contributed to the preservation or creation of the fund in its custody should be paid before a general distribution among those entitled to receive it."

The lienors are, of course, the ones who will ultimately benefit if and when a fund can be created. But at the time the service is rendered the benefit thereof is not tied to lienors at all, but to the property in custody, as the court states (274 U. S. 117, 122):

> "It is enough if the court approves the service rendered or permits it to be rendered, and it inures to the benefit of the property or funds in its custody."

It therefore appears that the petitioners' real quarrel is not, and cannot logically be, with the Court of Appeals which followed *Poznan*, but with *Poznan* itself. What they ask is, in essence, that this court should re-visit and repudiate *Poznan*. They, after all, are the ones who seek to overturn settled law.

III.

Those who seek or endorse certiorari cannot even show any individual harm.

With respect to petitioners, Webber, *et al.*, it now appears that the issue is moot (pp. 2, 3, *supra*). With respect to Turner and Blanchard, Inc., its claim, when proved by applicable standards, will be paid in full (pp. 3, 4, *supra*). With respect to Maritime Food Corporation, which has joined as a petitioner, its claim is behind the Mortgage, whereat, in any event, all distribution stops. As a practical matter, the issue is moot as to said petitioner also.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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October 1, 1963

Certification of Service.

This is to certify that on the 7th day of October, 1963 I served true and correct copies of the foregoing brief by first class mail upon counsel for the respective parties hereto, as follows:

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against

TURNER & BLANCHARD, INC.,

Respondents,

and

SS. *EMILIA* and A. H. BULL STEAMSHIP CO.

BRIEF OF CALTEX (INDIA) LIMITED IN OPPOSITION TO PETITON FOR CERTIORARI

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IN THE

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TURNER & BLANCHARD, INC.,

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SS. *Emilia* and A. H. BULL STEAMSHIP CO.,

BRIEF OF CALTEX (INDIA) LIMITED IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is on behalf of CALTEX (INDIA) LIMITED (hereinafter called "Caltex"), an appellee in the Court of Appeals and one of more than 200 consignees of goods which were shipped upon the SS. *Emilia*, as a common carrier, for delivery at various foreign ports. The goods were eventually discharged from the vessel at New York by the United States Marshal pursuant to the order of sale questioned by the petitioners.

QUESTIONS PRESENTED

The petition for certiorari* erroneously represents that the decisions below present questions as to distribution of

* This brief also opposes the petition of Maritime Food Corporation (October Term, 1963, No. 499) which merely asks certiorari for "the reasons set forth" in the petition of Lydon Webber, *et al.* (No. 463).

a fund among maritime lienors having conflicting claims. In fact, no fund or proceeding for distribution of a fund existed when the District Court made and the Court of Appeals affirmed the order which is the subject of the petition. That order directed the United States Marshal to sell the SS. *Emilia pendente lite.* (App.* D)

The only questions presented in respect of that order are:

(1) Whether the District Court exceeded its discretionary power to determine the terms of sale of a vessel by including in such terms an order to the United States Marshal to discharge, prior to the sale, cargo of third parties then aboard the vessel and authorized the costs of discharge to be repaid out of the proceeds of sale; and

(2) Whether this Court should exercise its discretionary power to review the order of sale at the instance of petitioners who never did apply for a stay of any kind before the Marshal had discharged the cargo and had sold the vessel in reliance upon the validity of the order of the District Court affirmed by the Court of Appeals?

Statement of the Case

The only order presented for review is the order, dated May 21, 1963, for the sale of the SS. *Emilia pendente lite,* (App. D). It was made upon a motion by Turner & Blanchard, Inc., libelants in an admiralty suit brought by them as operators of the wharf where the *Emilia* had loaded and was still lying. The suit was against the SS. *Emilia in rem* and against her insolvent owner, A. H. Bull Steamship Co., *in personam.* (App. B) More than 25 other suits were also pending against the vessel. (App. pp. 10a-12a)

* "App." refers to the appendix to the brief of petitioners Lydon Webber, *et al.*

Petitioners object only to those provisions of the order of sale which directed the Marshal to sell the vessel "free of cargo" and authorized the Marshal's costs for unloading to be deemed an "expense of the sale" and repaid "out of the proceeds of sale" (App. p. 15-a).

The necessity for the sale of the *Emilia* was unquestionable and is not challenged. The vessel and cargo (all of which belonged to third parties) were deteriorating and the expense of keeping the vessel in custody was wholly disproportionate to her value.

Discharge of the cargo prior to the sale was manifestly necessary because the Marshal had failed to obtain any bid for the vessel when he had offered her for sale (pursuant to a prior order of the District Court) without removal of the cargo. (App. pps. 13-a; 21-a)

In order to effect the discharge, it was also necessary to authorize the Marshal to pay for such discharge out of the proceeds of sale because no other means of payment existed. No person or persons other than the insolvent owner had any legal obligation to provide funds for the discharge nor could anyone be compelled to provide such funds.

After the discharge had been effected, the Marshal delivered the goods of Caltex unconditionally to its representatives at New York who have forwarded it to India, its original destination. No doubt, a like situation exists as to the shipments of other parties.

The Marshal sold the SS. *Emilia* on July 30, 1963, for $250,000 and on August 7, 1963 the District Court directed the Clerk to pay the Marshal the sum of $192,176.62 "out of the proceeds of the sale" to cover the Marshal's fees, costs and expenses, including the cost of discharge. (App. F)

The net proceeds of the sale, amounting to $57,823.38, constitute a fund which will be available for distribution to those persons who may be able in the future to establish valid claims against the fund.

Argument

From the foregoing statement, the premature nature of the questions suggested and the arguments made in the petition for certiorari and supporting brief are obvious. They relate only to questions as to the distribution of the fund which can only arise when the pertinent facts have been established in appropriate future proceedings.

Review of the District Court's order of sale should be denied by this Court for the following reasons, among others:

(1) The District Court's order for the sale of the SS. *Emilia* was an exercise of the Court's discretionary power of sale under Rules 11, 12 and 40 of the Rules of Practice in Admiralty promulgated by this Court (245 U. S. App.) and having the force of statutory law (28 U. S. C. §§2071-2073). Discretionary power of the Court to fix the terms of sale was expressly included by the Rules and was also implicit in the power to sell.

Both lower courts held that, under the factual situation then existing, the District Court validly exercised its discretionary power in ordering the Marshal to discharge the cargo prior to the sale and to reimburse himself from the proceeds of sale for the cost of discharge. In fact, those provisions were essential to the accomplishment of of the Court's primary power and duty to sell the *Emilia*.

This Court will not review discretionary orders whose propriety is established by concurring decisions of the lower courts on questions of fact. *Just* v. *Chambers*, 312 U. S. 383.

Furthermore, this Court's decision in *The Poznan*, 1927, 274 U. S. 117, was controlling. The expense of unloading the *Emilia*'s cargo and putting it on a wharf to make it available to its owners was indistinguishable, in principle, from the wharfage expense involved in the *Poznan* case. That wharfage expense was incurred for exactly the same purpose and was held by this Court to be payable out of the proceeds of sale before any distribution of the fund created by the sale. The wharfage expense was considered to be an incident of the administration of property or a fund in the custody of the Court for the benefit of suitors and was, therefore, chargeable to the fund before its distribution.

(2) An additional compelling reason exists why this Court should decline to exercise its discretionary power to review the decisions below. In view of the petitioners' inexcusable failure to apply for a stay of the discharge and sale before they had occurred and, further, because the Marshal and other parties cannot be restored to the position they had prior to having acted in reliance upon the order of the District Court, this Court should not permit that order to be disturbed.

Conclusion

The petition for certiorari should be dismissed.

October, 1963.

Respectfully submitted,

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ORIGINAL

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IN THE

Supreme Court of the United States

October Term, 1963

No. 463

LYDON WEBBER, JOHN MARTINSON, JOHN P. MURPHY, JOSEPH O'DONNELL, JULIO F. PACHECO, J. DAMSTEDT, JOSEPH NESSMAR, K. VLACHOS, ROBERT C. MISCIONE, SOREN LASSEN, EDWARD MARSH, RICHARD THOMPSON, GRADY WATSON, GERALD E. PETTIPAS, MARVIN PHILLIPS, JOHN BOLING, ZYGMUNT W. OSINSKI, RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, ROBERT MATTHEWS, and LINDSEY J. WILLIAMS, as Trustees of the Seafarers Welfare Plan; and RUSSELL H. BRANDON, MAX HARRISON, JAMES HAYES, AL KERR, E. B. McAULEY and AL TANNER, as Trustees of the Seafarers Vacation Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, KENNETH J. WRIGHT, RALPH E. CASEY, WILLIAM G. MULLINS, JOSEPH S. KISS, W. H. MILLS, C. J. BRACCO and JAMES TIERNEY, as Trustees of the Radio Officers Union Pension and Welfare Plan; JOSEPH P. GLYNN, ANDREW MacDONALD, WILLIAM G. MULLINS, JOSEPH S. KISS and W. H. MILLS, as Trustees of the Radio Officers Union Vacation Plan; ROBERT C. FRAVEL, AHMED MEHSSIN; and MAX HARRISON and PRICE C. SPIVEY, as Trustees of the Maritime Advancement Programs,

Petitioners,

against

TURNER & BLANCHARD, INC.,

Respondents;

and

S.S. EMILIA and A. H. BULL STEAMSHIP CO.

PETITIONERS' REPLY

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HOWARD SCHULMAN,
of Counsel.

IN THE

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PETITIONERS' REPLY

Reply Arguments

1. The cargo owners in their brief state that almost all of the seamen wage lienors have been paid their wages. This is not so. It is conceded that there are seamen wage lienors

as well as maintenance and cure lienors who have not been paid and are entitled to preferred maritime liens.

(a) It is respectfully submitted that such argument, made by the cargo owners, is merely used to cloud and divert the real issue in this case. One of the major issues of law before this Court is whether the long-established law, concerning the priority of maritime liens and how they should be paid, should be changed. It does not matter whether one or numerous seamen wage lienors remain unpaid.

(b) The next question of law concerns the application of the rule enunciated by this Court in the *Poznan* case. The *Poznan* case held that expenditures which inured to the benefit of lienors of an attached vessel, which helps create or preserve the fund available for distribution, should be treated as an expense of administration and charged against the proceeds of the sale of the vessel before satisfaction of payment of all other liens. The question of law present is whether the *Poznan* rule can be applied to destroy long-established rights of seamen. The record below clearly shows that the acts do not preserve or create a fund as required by the *Poznan* case, but in fact destroys or depletes it, which is contrary to the *Poznan* doctrine and rationale. The *Poznan* case seeks to prevent unjust enrichment while the decision below does just the opposite.

2. Petitioners did not engage in any delay as claimed by the cargo owners, in not seeking a stay of the order discharging the cargo. The propriety of the discharge of the cargo has never been an issue. The sole issue is who should bear the cost thereof, the seamen or the cargo owners. Contrary to the opposition's contention, the record conclusively demonstrates that petitioners moved expeditiously and timely to prevent the distribution of any funds to cover the cost of the cargo's discharge.

3. Petitioner Maritime Food Corporation joins in support of this reply.

CONCLUSION

For the reasons set forth herein and in the petition for a writ of certiorari, the relief requested herein should be granted.

Respectfully submitted,

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Dated: October 10, 1963.